TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 625.

JOHN G. KNOX, AS SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JONAS B. KINSAM, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

RICHARD J. MORRIGOTT, AS LATE COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

IN ERROR TO THE [illegible]

(28,557)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 602.

JOHN C. KNOX, AS SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JONAS B. KISSAM, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

RICHARD J. McELLIGOTT, AS LATE COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1921.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, plaintiff-in-error, and John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, defendants-in-error, a manifest error *hath* happened, to the great damage of the said defendants-in-error as by this complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause
II further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 7th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-one.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

The foregoing writ is hereby allowed, upon the giving by Lilian Easton Ely, one of the defendants-in-error herein, of a bond in the sum of two hundred and fifty dollars according to law.

HENRY WADE ROGERS,
United States Circuit Judge.

III SIR:

Please take notice that the within is a copy of a Writ of Error etc. in the within-entitled action this day duly entered and filed in the

office of the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.

Dated, New York, October 8, 1921.

Yours, etc.,

STARK B. FERRISS,
Attorney for Plaintiffs-in-Error.

Office and P. O. Address, 165 Broadway, Borough of Manhattan, City of New York, N. Y.

To William Hayward, Esq., Attorney for Defendant-in-Error.

Service of a Copy of the within Writ of Error and Notice of Filing is hereby admitted this 8th day of October, 1921.

____ ____,
Attorney for Defendant-in-Error.

[Endorsed:] United States Supreme Court. John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, Plaintiffs-in-Error, vs. Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, Defendant-in-Error. Writ of Error and Notice of Filing. Stark B. Ferriss, Attorney for Pl'ffs-in-Error, 165 Broadway, New York. 8. Wm. Hayward. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 8, 1921. William Parkin, Clerk.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the District Court before you, or some of you, between Cornelia B. Kissam and John C. Knox as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, deceased, and Cornelia B. Kissam, individually and as Sole Beneficiary under said Last Will and Testament, plaintiffs, and Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, defendant, a manifest error hath happened to the great damage of said defendant, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things con-

cerning the same, to the Judges of the United States Circuit
2 Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place before the Judges aforesaid, on the 5th day of March, 1921, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 7th day of February, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

AUGUSTUS N. HAND,
United States District Judge.

3 *Summons.*

United States District Court for the Southern District of New York.

L. 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

vs.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear, or an-
4 swer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the

City of New York, this 11th day of May, in the year one thousand nine hundred and twenty.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

STARK B. FERRISS,
Plaintiffs' Attorney.

Office and Post Office Address, 165 Broadway, Borough of Manhattan, New York City.

5 *Complaint.*

United States District Court for the Southern District of New York.

L. 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

The plaintiffs, appearing herein by Stark B. Ferriss, their attorney, for their complaint against the defendant, respectfully show to this Court and allege as follows:

For a First Cause of Action.

(Tax on Bonds and Mortgages and Railroad, etc., Bonds.)

6 First. That on the 2nd day of June, 1917, Jonas B. Kissam, then a resident of the County of New York in the State of New York, died, leaving a last will and testament which was thereafter on the 18th day of June, 1917, duly admitted to probate by the Surrogates' Court of New York County, and duly recorded in Liber 1057 of Wills, at page 90 thereof, in said Surrogates' office; that in and by said last will and testament, the plaintiffs Cornelia B. Kissam and John C. Knox were nominated and appointed the executrix and executor thereof; that they duly qualified as such executrix and executor in conformity with the laws of the State of New York; that letters testamentary were duly issued to them as such executrix and executor by said Surrogates' Court of New York County on the 18th day of June, 1917; and that they have been at all times since said date last mentioned, and still are, acting as executrix and executor of and under said last will and testament.

Second. That the plaintiff Cornelia B. Kissam is the widow of said Jonas B. Kissam, deceased, and is the sole legatee, devisee and beneficiary under said last will and testament; that the said Cornelia

B. Kissam, at all the times herein mentioned was a citizen of the State of New York, and a resident and inhabitant of the Borough of Manhattan in the City of New York, which is within said Southern District of New York; and that during all the times herein mentioned, the plaintiff John C. Knox was and now is a citizen of the State of New York and a resident and inhabitant of the Borough of the Bronx in the City of New York, which is within said Southern District of New York.

Third. Upon information and belief, that the defendant
7 at all times from March 26th, 1919, to and including June 13th, 1919, was the Acting Collector of Internal Revenue for the Third District of New York, and during all that time was, and still is, a resident and inhabitant of the Borough of Manhattan in the City of New York, which is within the said Southern District of New York.

Fourth. These plaintiffs aver that this is a suit of a civil nature at law, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and that this suit and the causes of action herein set forth arise under the Constitution and laws of the United States, and under the laws of the United States providing for internal revenue.

Fifth. That on or about the 15th day of July, 1912, said Jonas B. Kissam was the owner of all the bonds and mortgages mentioned or referred to in the schedule hereto annexed, marked Schedule "A" and made a part hereof, and that being such owner, said Jonas B. Kissam on or about said 15th day of July, 1912, duly granted, bargained, sold, assigned, transferred and set over unto John C. Knox individually, all the said bonds and mortgages mentioned in Schedule "A" by ten several instruments of assignment, all of which are mentioned or referred to in Schedule "A."

Sixth. That on or about the 19th day of July, 1912, said John C. Knox, for and in consideration of the respective considerations mentioned in the several assignments stated to have been made by him as mentioned or referred to in Schedule "A," duly granted,
bargained, sold, assigned, transferred and set over unto said
8 Jonas B. Kissam and Cornelio B. Kissam, his wife, their survivor, such survivor's executors, administrators and assigns, the said ten several bonds and mortgages mentioned in Schedule "A" by the ten several instruments of assignment mentioned in said Schedule "A" as having been made by said John C. Knox, each and all of which assignments were in writing, duly executed and recorded in the office of the Register of the County of New York in the following books of record in said office respectively, to wit:

Liber 183, §4 of Mortgages, page 208,
Liber 83, §8 of Mortgages, page 221,
Liber 83, §8 of Mortgages, page 220,
Liber 146, §9 of Mortgages, page 238,
Liber 314, §7 of Mortgages, page 119,

Liber 313, §7 of Mortgages, page 99,
Liber 313, §7 of Mortgages, page 101,
Liber 314, §7 of Mortgages, page 120,
Liber 314, §7 of Mortgages, page 118,
Liber 314, §7 of Mortgages, page 114,

and that each of said instruments of assignment describes said John C. Knox as party of the first part, and the said Jonas B. Kissam and Cornelia B. Kissam, his wife, as party of the second part, and that in each of said instruments of assignment the granting clause, so-called, thereof runs "to the party of the second part, their survivor, such survivor's executors, administrators and assigns," and that the habendum clause, so-called, in each of said instruments of assignment runs "to the party of the second part, the survivor of them, and to the successors, personal representatives and assigns of the said party of the second part forever," and that after the
9 habendum clause in each of said instruments, it is stated that "It is the intention of this assignment that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bond and mortgage, and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

Seventh. That on or about the 15th day of July, 1912, said Jonas B. Kissam was the owner of all the bonds mentioned in Schedule "B" hereto annexed and made a part hereof, and that being such owner, said Jonas B. Kissam on or about said 15th day of July, 1912, duly granted, bargained, sold, assigned, transferred and set over unto said John C. Knox individually all the bonds mentioned in said Schedule "B."

Eighth. That on or about the 13th day of August, 1912, said John C. Knox, for and in consideration of Ten Dollars, lawful money of the United States, and other valuable consideration to him in hand paid, duly granted, bargained, sold, assigned, transferred and set over unto said Jonas B. Kissam and Cornelia B. Kissam, his wife, their survivor, such survivor's executors, administrators and assigns, all the said bonds mentioned in Schedule "B," by an instrument in writing dated August 13th, 1912, duly executed, acknowledged and delivered by the said John C. Knox; that the granting clause in said instrument of assignment runs "unto the said Jonas B. Kissam and Cornelia B. Kissam, their survivor, such survivor's executors, administrators and assigns;" that the habendum clause in
10 said instrument of assignment runs unto said Jonas B. Kissam and Cornelia B. Kissam, "their survivor, such survivor's executors, administrators and assigns forever;" and that it is stated in said instrument of assignment that, "It is the intent of this instrument that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said Bonds, and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

Ninth. Upon information and belief, that subsequent to August 13th, 1912, and prior to the death of said Jonas B. Kissam, the 20 Interborough Rapid Transit Company bonds due in 1952, mentioned in Schedule "B," were exchanged by said Jonas B. Kissam and Cornelia B. Kissam for the 20 Interborough Rapid Transit Company First and Refunding 5% Bonds, due January 1st, 1966, which are mentioned in the said Return filed by the plaintiffs, as executrix and executor, mentioned in paragraph "Eleventh" hereof, and that the Interborough bonds last mentioned, due in 1966, were held by said Jonas B. Kissam and said Cornelia B. Kissam on the same terms and conditions and in the same ownership respectively as were the said Interborough bonds mentioned in Schedule "B" which were payable in 1952.

Tenth. Upon information and belief, that at and upon the delivery (within the months of July and August, 1912), by the said John C. Knox to the said Jonas B. Kissam and Cornelia B. Kissam, of the said several instruments of assignment hereinbefore referred
11 to, the said Cornelia B. Kissam, in and upon behalf of her individual right, became vested with the ownership of an undivided one-half interest in all the property mentioned in Schedules "A" and "B" (the Interborough bonds due in 1966 taking the place of the Interborough bonds due in 1952, as hereinbefore alleged), subject to the right of said Jonas B. Kissam to take and acquire the same by survivorship in the event that said Cornelia B. Kissam should die before said Jonas B. Kissam; and further, upon information and belief, that such ownership continued during all the times mentioned herein, that said Cornelia B. Kissam gained nothing in regard to such ownership by the death of her said husband except as the jus accrescendi eliminated his interest, and that at and upon the death of the said Jonas B. Kissam, upon said 2nd day of June, 1917, no right, title or interest of any kind whatsoever in, of and to her said undivided one-half interest in said property mentioned in said Schedules "A" and "B" (the Interborough Rapid Transit bonds due in 1966 being substituted as aforesaid for similar bonds due in 1952) passed to or became the property of said Cornelia B. Kissam either under said last will and testament of said Jonas B. Kissam or the intestate laws of the State of New York or otherwise.

Eleventh. That pursuant to the provisions of the Act of Congress entitled, "An Act to Increase the Revenue and for Other Purposes," approved by the President of the United States on September 8th, 1916, known as the Estate Tax Law, as amended by Title III of the Act of Congress entitled "An Act to Provide Increased Rev-
12 enue to Defray the Expenses of the Increased Appropriations for the Army and Navy and the Extensions of Fortifications, and for Other Purposes," which said last mentioned act was approved by the President on March 3rd, 1917, and to the regulations of the Secretary of the Treasury and his subordinates promulgated and in effect with reference thereto, the plaintiffs, as executrix and executor as aforesaid, on or about the 7th day of

December, 1917, duly made and executed the Return for the Estate Tax on the Estate of said Jonas B. Kissam, deceased, on form No. 706, furnished by the Collector of Internal Revenue for the Third District of New York for that purpose, and duly filed the same in duplicate on or about the 10th day of December, 1917, in the office of said Collector of Internal Revenue for the Third District of New York.

Twelfth. That thereafter, and on or about the 16th day of May, 1918, the plaintiffs, as executrix and executor as aforesaid, paid to the Collector of Internal Revenue for the Third District of New York, an Estate Tax, so-called, assessed under the provisions of said Acts of Congress on the net estate of said Jonas B. Kissam, deceased, for taxation, in the sum of $5,354.14, less a discount of $11.89 allowed by law for the advance payment of said tax before June 2nd, 1918, which was the expiration of one year from and after the death of said Jonas B. Kissam.

Thirteenth. That thereafter and on or about the 9th day of May, 1919, the Commissioner of Internal Revenue, purporting to act by virtue of authority vested in him under said Estate Tax Law,
13 reviewed and audited said Return and made certain increases in valuations of said Estate of Jonas B. Kissam, deceased, and assumed to impose an additional assessment against said Estate under the Acts of Congress aforesaid, which increases of valuation with respect to the bonds and mortgages mentioned in Schedule "A" amounted to $149,925.74, and which increases of valuation with respect to the bonds mentioned in Schedule "B" (the Interborough Rapid Transit Company bonds due in 1966, held by said Jonas B. Kissam and Cornelia B. Kissam at the time of the death of said Jonas B. Kissam being in lieu of the Interborough Rapid Transit Company bonds due in 1952, mentioned in Schedule "B") amounted to $52,886.63, said increases amounting together to $202,812.37. That said Commissioner of Internal Revenue, in reviewing and auditing said Return as aforesaid, made certain other increases in the valuation of said Estate in addition to those hereinbefore mentioned.

Fourteenth. That said Commissioner of Internal Revenue, after making the increases in valuation mentioned or referred to in paragraph "Thirteenth" hereof, assumed to impose a certain other additional assessment of tax upon and against the Estate of said Jonas B. Kissam, deceased, on such increased valuations, which so-called assessment of tax in all amounts to the sum of $13,668.60, and amounts, with respect to and upon the property mentioned in Schedules "A" and "B" and to the increase of valuation thereof amounting to $202,812.37 mentioned in paragraph "Thirteenth" hereof, to the sum of $11,819.74.

14 Fifteenth. That thereafter and on or about the 31st day of May, 1919, the plaintiffs, as executrix and executor as aforesaid, delivered to and filed with the defendant on form No. 47, furnished by the defendant, a claim for the abatement of $12,840.69

of the then uncollected said sum of $13,668.60, which the Commissioner of Internal Revenue had then assumed to assess against the Estate of said Jonas B. Kissam, as aforesaid, upon and by reason of the increased valuations made by said Commissioner of Internal Revenue, which claim for abatement covered and included, among other items of increased valuations, all the increased valuations mentioned, set forth or referred to in paragraph "Thirteenth" hereof, to which claim for abatement, now on file in the office of the defendant, or of the Commissioner of Internal Revenue, as the case may be, the plaintiffs hereby refer for greater certainty.

Sixteenth. That no ruling of the defendant or of the Commissioner of Internal Revenue upon said claim for abatement was received by the plaintiffs, as executrix and executor as aforesaid, or otherwise, on or prior to June 13th, 1919, and that on or about said last mentioned date, in compliance with the written demand of the defendant dated May 16th, 1919, made by the defendant to the plaintiffs, as executrix and executor as aforesaid, or to one of them, and solely in order to avoid the imposition of penalties and interest, and to avoid distraint and sale of the property of the said Estate of Jonas B. Kissam, deceased, and upon compulsion and under duress and coercion, the plaintiffs, as executrix and executor as
15 aforesaid, paid to the defendant as such Acting Collector of U. S. Internal Revenue, but under protest, the sum of $13,668.60 so additionally assessed upon or against said estate, as aforesaid, and that said protest was in writing addressed to the defendant and accompanied payment of said sum of $13,668.60, and that in and by said protest, the plaintiffs reserved all their rights for relief in the premises, including the right to a refund of the said amount then and there paid.

Seventeenth. That thereafter and on or about the 12th day of July, 1919, the plaintiffs, as executrix and executor as aforesaid, duly took an appeal to the Commissioner of Internal Revenue, and duly demanded the refund and repayment to them of said sum of $12,840.69, by and in accordance with the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and filed with the defendant a claim for such refund on form No. 46, furnished by the defendant for that purpose, and attached to said claim the receipt of the defendant, as Acting Collector as aforesaid, for said sum of $13,668.60, paid as aforesaid, and also a certificate by the Clerk of the Surrogates' Court of the County of New York showing that letters testamentary on the Estate of said Jonas B. Kissam, deceased, were duly granted to the plaintiffs, as executrix and executor as aforesaid, on the 18th day of June, 1917, and that such letters did not appear by the records of said Court to have been revoked at the date of said certificate, to-wit, July 12th, 1919.

16 Eighteenth. That said claim for refund included, among other things, a claim for the refund of the amount of such

so-called additional tax assumed to be imposed or assessed by the Commissioner of Internal Revenue upon said Estate by reason of, and based upon, the increased valuations of said bonds and mortgages mentioned in Schedule "A" and upon the increased valuations of said bonds mentioned in Schedule "B," including the increased valuations of the Interborough Rapid Transit Company bonds, due in 1966, held by the plaintiff Cornelia B. Kissam and said Jonas B. Kissam, in lieu of the Interborough Rapid Transit Company bonds due in 1952, as mentioned in Schedule "B."

Nineteenth. That thereafter and on or about the 20th day of October, 1919, the Commissioner of Internal Revenue by letter dated that day, addressed to the plaintiff John C. Knox, as executor as aforesaid, rendered a decision, wherein and whereby he denied and rejected the claim of the plaintiffs, as executrix and executor as aforesaid, for a refund of the said sum of $12,840.69 so collected erroneously, unjustly and without lawful authority, and of any and every part of said sum, and that no refund or return has been made to the plaintiffs, or to any or either of them, by the defendant, or by the United States of America, or by any officer or agent of the United States of America, or by any person or persons whomsoever, of all or any portion of the said sum of $13,668.60 paid by the plaintiffs, as executrix and executor as aforesaid.

17 Twentieth. That there was not on the 13th day of June, 1919, or at any other time either before or since said date, any sum due from the plaintiffs, or any or either of them, whether as executrix, executor or otherwise, as or for an estate tax upon the transfer of or succession to the Estate of Jonas B. Kissam, deceased, in excess of the sum of $6,182.05, which sum is the aggregate of the amount of $5,354.14 paid by the plaintiffs, as executrix and executor as aforesaid, to the defendant without protest, as alleged in the "Twelfth" paragraph of this complaint, plus $827.91 which is the portion of said additional tax of $13,668.60 as to which no claim for refund has been made.

Twenty-first. Upon information and belief, that the Commissioner of Internal Revenue, in reviewing and auditing said Return for Estate Tax and assessing the said sum of $13,668.60, as additional tax as aforesaid, and the defendant in demanding payment thereof, both assumed to act under the provisions of subdivision (c) of Section 202, Title II of said Act of Congress of September 8th, 1916, as amended, which reads as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or de-
18 posited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof

as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

but the plaintiffs, as executrix and executor as aforesaid, and the plaintiff Cornelia B. Kissam individualy and as sole beneficiary under said last will and testament of said Jonas B. Kissam, deceased, all aver that the Commissioner of Internal Revenue was without lawful authority to assess or impose said so-called additional tax, and that the defendant, as such Acting Collector, was without lawful authority to demand and enforce, or threaten to enforce, payment of said so-called additional tax of $13,668.60 imposed, or assumed to be imposed, as aforesaid, for the reason that the said Estate Tax Law and the amendments thereof, in so far as the same provide or attempt to provide for the imposition of any assessment or tax upon property which at the time of the passage of said law was vested in any person or persons other than the decedent or decedents to whom the provisions of said law are applicable, purports to authorize the imposition of a direct tax upon property, and that there is in said law no provision for the apportionment of such direct tax among the several states, as required by the Constitution of the United States, and that in so far as and to the extent that said Estate Tax Law and the amendments thereof have been or can be construed as an attempt to authorize the taxation of the said property of the plaintiff Cornelia B. Kissam which vested in her in the year
19 1912 under the assignments made and executed by John C. Knox, as hereinbefore alleged, said law or laws is and are repugnant to and in conflict with the provisions of Sections 2 and 9 respectively of Article I of said Constitution, and are repugnant to and in conflict with that portion of the Fifth Amendment to said Constitution which provides that private property shall not be taken without due process of law, and that all the acts and things done by the Commissioner of Internal Revenue in assuming to assess such additional tax, as mentioned in paragraph "Fourteenth" hereof, and that all acts and things done by the defendant in demanding and enforcing the collection of said taxes, were and are wholly unauthorized by law and void.

Twenty-second. These plaintiffs aver that by reason of the premises the assessment of so much of said so-called additional tax of $13,668.60 against said Estate of Jonas B. Kissam, deceased, as was imposed upon the transfer of said property mentioned in Schedules "A" and "B," to-wit, the sum of $11,819.74, and the collection thereof, purporting to be by virtue of the provisions of said Act of Congress of September 8th, 1916, as amended, as aforesaid, are unjust, unwarranted and oppressive, and are not authorized, warranted or justified by reason of anything in said statute contained, and that said sum of $11,819.74 is justly due to the plaintiffs.

A detailed statement of the increases in valuation referred to in paragraph "Thirteenth" hereof, together with specifications of the amount sought to be recovered in this cause of action as an

20–38 unwarranted additional assessment of said Estate Tax, is annexed hereto, marked Schedule "D" and made a part hereof.

* * * * * * *

39 Wherefore, the plaintiffs, Cornelia B. Kissam and John C. Knox, as executrix and executor of the last will and testament of Jonas B. Kissam, deceased, and the plaintiff Cornelia B. Kissam individually and as sole beneficiary under said last will and testament, jointly demand judgment against the defendant as follows:

Under the First Cause of Action.

For the sum of Eleven thousand eight hundred and nineteen and 74/100 ($11,819.74) Dollars, with interest thereon from the 13th day of June, 1919;

* * * * * * *

40 Under the Fourth Cause of Action.

For the sum of Two hundred and forty-nine and 30/100 ($249.30) Dollars, with interest thereon from the 13th day of June, 1919;

Together with the costs and disbursements of this action.

STARK B. FERRISS,
Attorney for Plaintiffs.

Office and Post Office Address, No. 165 Broadway, Borough of Manhattan, City of New York, N. Y.

41 STATE OF NEW YORK,
City and County of New York,
Southern District of New York, ss:

John C. Knox, being duly sworn, deposes and says:

I, as an executor of the last will and testament of Jonas B. Kissam, deceased, am one of the plaintiffs herein; I have read the foregoing complaint and know the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe it to be true; I am acquainted with the facts of the case.

JNO. C. KNOX.

Sworn to before me this 8th day of May, 1920.

[SEAL.] MINNIE L. S. BONAR,
Commissioner of Deeds, New York City,
Residing Kings County.

Clerk's No. 91, Reg. No. 172.
Certificates filed: Richmond Co.
Queens County Clerk's No. 3951.
N. Y. Co. Clk.'s No. 272; Reg. No. 20100.
Bronx Co. Clk.'s No. 30; Bronx Reg. No. 2020.
My term expires October 15, 1920.

42 STATE OF NEW YORK,
City and County of New York,
Southern District of New York, ss:

Cornelia B. Kissam, being duly sworn, deposes and says:
I am one of the plaintiffs herein; I am blind and therefore cannot read, but I have heard the foregoing complaint read and know the contents thereof; the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe it to be true; I am acquainted with the facts of the case.

CORNELIA B. KISSAM.

Sworn to before me this 7th day of May, 1920.

[SEAL.] MINNIE L. S. BONAR,
Commissioner of Deeds, New York City,
Residing Kings County.

Clerk's No. 91, Reg. No. 172.
Certificates filed: Richmond County.
Queens County Clerk's No. 3951.
N. Y. Co. Clk.'s No. 272; Reg. No. 20100.
Bronx Co. Clk.'s No. 30; Bronx Reg. No. 2020.
My term expires October 15, 1920.

43 STATE OF NEW YORK,
City and County of New York, ss:

Minnie L. S. Bonar, being by me duly sworn, deposes and says: I am a Commissioner of Deeds, residing in the City of New York, and am the same person whose name is subscribed to the foregoing affidavit of verification sworn to by Cornelia B. Kissam before me on the 7th day of May, 1920; before swearing Cornelia B. Kissam to said affidavit of verification, I personally read to her in full the foregoing complaint, and the affidavit subscribed by her.

MINNIE L. S. BONAR.

Sworn to before me this 11th day of May, 1920.
[SEAL.] IRENE M. CHEESMAN,
Notary Public of Kings Co., No. 261.

Certificate filed in N. Y. Co. No. 199.
Kings Co. Register's No. 1063.
New York Co. Register's No. 1290.
Term expires March 30th, 1921.

44 SCHEDULE "A."

Bond of Lucius M. Stanton, dated September 9th, 1907, for $20,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 183, §4 of Mortgages, page 208, on September 9th, 1907, covering premises known as No. 31 West 71st Street, Manhattan Borough, City of New York.

Assignment thereof by Title Guarantee and Trust Company to Nellie A. Grossman dated September 9th, 1907, and recorded in said Register's office in Liber 185, §4 of Mortgages, page 299.

Further assignment thereof by Jonas B. Kissam, as executor of the last will and testament of Nellie A. Grossman, deceased, to said Jonas B. Kissam, dated May 9th, 1912, and recorded in said Register's office May 10th, 1912, in Liber 232, §4 of Mortgages, page 235.

Further assignment thereof by Jonas B. Kissam to John C. Knox, dated November 8th, 1912, and recorded in said Register's office November 11th, 1912, in Liber 239, §4 of Mortgage page 9.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated November 8th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office November 21st, 1912, in Liber 183, §4 of Mortgages, page 208.

Bond of Donald Robertson, dated October 21st, 1907, for $50,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 57, §8 of Mortgages, page 19, on October 21st, 1907, covering premises situate at the northwesterly corner of Amsterdam Avenue and 167th Street, known as No. 2168 Amsterdam Avenue, Manhattan Borough,
45 City of New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 15th, 1912, and recorded in said Register's office July 22nd, 1912, in Liber 81, §8 of Mortgages, page 488.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 19th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 2nd, 1912, in Liber 83, §8 of Mortgages, page 221.

Bond of Donald Robertson, dated October 21st, 1907, for $32,500 and interest and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 57, §8 of Mortgages, page 22, on October 21st, 1907, covering premises known as

No. 2170 Amsterdam Avenue, Manhattan Borough, City of New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 15th, 1912, and recorded in said Register's office July 22nd, 1912, in Liber 81, §8 of Mortgages page 487.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 19th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 2nd, 1912, in Liber 83, §8 of Mortgages, page 220.

Bond of Henry S. Gamp, dated January 2nd, 1907, for $40,000 and interest and mortgage securing the same, recorded in the office of the Register of the County of New York, in Liber 100, §9 of Mortgages, page 229, on January 5th, 1907, covering premises known as Nos. 413 and 415 East 145th Street, Bronx Borough, City of
46 New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 6th, 1912, in Liber 144, §9 of Mortgages, page 387.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 146, §9 of Mortgages, page 238.

Bond of Leopold Kantor, Joseph B. Cooper and Louis Wittcoff, dated November 21st, 1906, for $42,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 223, §7 of Mortgages, page 271, on the 23rd day of November, 1906, covering premises known as No. 48 Convent Avenue, Manhattan Borough, City of New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 6th, 1912, in Liber 309, §7 of Mortgages, page 497.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 314, §7 of Mortgages, page 119.

Bond of Leopold Kantor, Joseph B. Cooper and Louis Wittcoff, dated November 21st, 1906, for $38,000 and interest, and mortgage securing the same recorded in the office of the Register of the County of New York in Liber 222, §7 of Mortgages, page 261, on November 23rd, 1906, covering premises known as No. 50 Convent Avenue, Manhattan Borough, City of New York.

47 Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office on August 6th, 1912, in Liber 309, §7 of Mortgages, page 500.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 313, §7 of Mortgages, page 99.

Bond of Leopold Kantor, Joseph B. Cooper and Louis Wittcoff, dated December 26th, 1906, for $20,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 224, §7 of Mortgages, page 226, on December 27th, 1906, covering premises known as Nos. 48 and 50 Convent Avenue, Manhattan Borough, City of New York.

Assignment thereof by Augustus F. Holly to Jonas B. Kissam, dated December 27th, 1906, and recorded in said Register's office December 27th, 1906, in Liber 224, §7 of Mortgages, page 230.

Further assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 6th, 1912, in Liber 309, §7 of Mortgages, page 498.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 313, §7 of Mortgages, page 101.

Bond of Leopold Kantor, Joseph B. Cooper and Louis Wittcoff, dated August 8th, 1905, for $10,000 and interest and mort-
48 gage securing the same, recorded in the office of the Register of the County of New York in Liber 195, §7 of Mortgages, page 58, on August 11th, 1905, covering premises known as Nos. 375 and 377 Edgecombe Avenue, Manhattan Borough, City of New York.

Assignment thereof by Samuel Green to Bella Hirsch, dated August 11th, 1905, and recorded in said Register's office, August 11th, 1905, in Liber 195, §7 of Mortgages, page 53.

Further assignment thereof by Bella Hirsch to Jonas B. Kissam, dated May 17th, 1906, and recorded in said Register's office May 21st, 1906, in Liber 211, §7 of Mortgages, page 456.

Further assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 7th, 1912, in Liber 314, §7 of Mortgages, page 94.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 314, §7 of Mortgages, page 120.

Bond of Leopold Kantor., Joseph B. Cooper and Louis Wittcoff, dated November 10th, 1906, for $40,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 226, §7 of Mortgages, page 26, on November 15th, 1906, covering premises known as No. 375 Edgecombe Avenue, Manhattan Borough, City of New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 7th, 1912, in Liber 314, §7 of Mortgages, page 95.

49 Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, and recorded in said Register's office August 17th, 1912, in Liber 314, §7 of Mortgages, page 118.

Bond of Leopold Kantor, Joseph B. Cooper and Louis Wittcoff, dated November 10th, 1906, for $40,000 and interest, and mortgage securing the same, recorded in the office of the Register of the County of New York in Liber 226, §7 of Mortgages, page 11, on November 15th, 1906, covering premises known as No. 377 Edgecombe Avenue, Manhattan Borough, City of New York.

Assignment thereof by Jonas B. Kissam to John C. Knox, dated July 23rd, 1912, and recorded in said Register's office August 6th 1912, in Liber 309, §7 of Mortgages, page 495.

Further assignment thereof by John C. Knox to Jonas B. Kissam and Cornelia B. Kissam, dated July 25th, 1912, for the consideration of $10 and other good and valuable consideration, recorded in said Register's office August 17th, 1912, in Liber 314, §7 of Mortgages, page 114.

SCHEDULE "B."

20 Interborough Rapid Transit Company 45 year 5% Gold Mortgage Bonds, dated November 1st, 1907, due November 1st, 1952, interest payable May 1st and November 1st of each year—said bonds being numbered as follows: 16501, 16502, 16503, 16504, 16505, 16506, 16507, 16508, 16509, 16510, 9871, 9872, 9873, 9874, 9875, 9876, 9877, 9878, 9879 and 9880.

50 20 Wabash Railroad Company First Mortgage 5% Gold Bonds dated May 1st, 1889, due May 1st, 1939, interest payable May 1st and November 1st—said bonds being numbered as follows: 8353, 4044, 18773, 20110, 8949, 8909, 8199, 1851, 1852, 10845, 10686, 10693, 5632, 20348, 10692, 10691, 10690, 10689, 10688 and 10687.

10 Texas & Pacific Railway Company First Mortgage 5% Bonds dated February 1st, 1888, due June 1st, 2000, interest payable June 1st and December 1st—said bonds being numbered as follows: 11320, 11323, 11324, 11391, 9766, 18056, 18057, 22628, 24427 and 24930.

10 Hocking Valley Railway Company First Consolidated Mortgage 4½% Gold Bonds dated March 1st, 1899, due July 1st, 1999, interest payable January 1st and July 1st—said bonds being numbered as follows: 4744, 4745, 1120, 5169, 5170, 6216, 6217, 7862, 7863 and 7864.

10 New York Telephone Company First and General Mortgage 4½% Gold Sinking Fund Bonds, dated October 1st, 1909, due November 1st 1939, interest payable May 1st and November 1st—said bonds being numbered as follows: 15650, 16017, 16018, 16019, 16020, 16021, 2204, 2205, 2206 and 2207.

20 Lake Shore & Michigan Southern Railway Company 25 year 4% Gold Bonds of 1906, dated March 12th, 1906, due May 1st, 1931, interest payable May 1st and November 1st—said bonds being numbered as follows: 34294, 34295, 34296, 34297, 34298, 5271, 5272, 5273, 5274, 5275, 23606, 23607, 23608, 23609, 23610, 23611, 23612, 23613, 23614 and 23615.

20 Missouri Pacific Railway Company Consolidated First
51 & 52 Mortgage 6% Gold Bonds, dated November 1st, 1880, due November 1st, 1920, interest payable May 1st and November 1st—said bonds being numbered as follows: 10490,10491, 10492, 10493, 10494, 4058, 4059, 4060, 1380, 2322, 13467, 13468, 13469, 14238, 14239, 14374, 14375, 14376, 14377 and 10500.

* * * * * * *

SCHEDULE "D."

Statement of Increases in Valuation of Property and Decrease in Allowance of Deductions Made by Commissioner of Internal Revenue, Together with Specifications of Amount Sought to be Recovered in Each Cause of Action as an Unwarranted Additional Assessment of Estate Tax.

* * * * * * *

53 II.

Increases in Valuations of Bonds and Mortgages and Bonds Owned by Decedent, Jonas B. Kissam, and Plaintiff, Cornelia B. Kissam, Individually, on Account of Which a Refund is Claimed, as Set Forth in the First Cause of Action.

Bonds and Mortgages.

Bond of L. M. Stanton	$10,000.00	
Accrued interest thereon	140.00	
Bond of D. Robertson	22,500.00	
Accrued interest thereon	131.25	
Bond of D. Robertson	15,000.00	
Accrued interest thereon	87.50	
Bond of H. S. Gamp	20,000.00	
Accrued interest thereon	163.89	
Bond of L. Kantor, et al	21,000.00	
Accrued interest thereon	90.41	
Bond of L. Kantor, et al	19,000.00	
Accrued interest thereon	81.81	
Bond of L. Kantor, et al	2,000.00	
Accrued interest thereon	12.72	
Bond of L. Kantor, et al	5,000.00	
Accrued interest thereon	28.41	
Bond of L. Kantor, et al	17,250.00	
Accrued interest	94.87	
Bond of L. Kantor, et al	17,250.00	
Accrued interest thereon	94.88	
		$149,925.74

54 & 55 Bonds.

$20,000 Interborough Rapid Transit, 1st & Refunding 5%	$9,400.00	
Accrued interest thereon	209.46	
$20,000 Wabash R. R. Co. 1st Mtge. 5% Gold	10,062.50	
Accrued interest thereon	43.04	
$10,000 Texas & Pacific Railway Co. 1st Mtge. 5%	4,875.00	
Accrued interest thereon	.68	
$10,000 Hocking Valley Railway Co., 1st Consolidated Mtge. 4½% Gold	4,100.00	
Accrued interest thereon	94.37	
$10,000 N. Y. Telephone Company, 1st & General 4½% Gold Sinking Fund	4,775.00	
Accrued interest thereon	19.37	
$20,000 L. S. & M. S. Ry. Co., 25 yr. 4% Debenture Gold	9,087.50	
Accrued interest thereon	37.89	
$20,000 Missouri Pacific Railway Co. Consolidated 1st Mtge. 6% Gold	10,125.00	
Accrued interest thereon	56.82	
		52,886.63

* * * * * * *

56 Specifications of Amount Sought to be Recovered in Each Cause of Action as an Unwarranted Additional Assessment of Estate Tax.

First Cause of Action (tax on bonds and mortgages and railroad, etc. bonds)—increase in valuations amounting to $202,812.37: 6% on $179,545.62 (the difference between $429,545.62, the full valuation claimed by the Government, and $250,000)	$10,772.74	
4½% on the balance of the increase in valuation ($23,266.75)	1,047.00	
		$11,819.74

* * * * * * *

57 Interest on the sum sought to be recovered in each cause of action is claimed from the 13th day of June, 1919, when additional tax was paid to defendant.

58 *Demurrer.*

United States District Court, Southern District of New York.

L 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

Defendant above named, by Francis G. Caffey, United States Attorney for the Southern District of New York, his attorney, demurs to that part of the complaint entitled "For a First Cause of Action" covering paragraphs numbered "First" to "Twenty-second," inclusive, on the ground that the same does not state facts sufficient to constitute a cause of action.

59 Wherefore defendant demands judgment dismissing said alleged first cause of action together with the costs and disbursements of this action.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

Office & P. O. Address, U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

60 *Opinion.*

United States District Court, Southern District of New York.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

Motion by Plaintiffs for Judgment on the Pleadings on the First Cause of Action.

Stark B. Ferriss (Joseph T. Stearns, of counsel), *all* of New York City, for plaintiffs, for the motion.

Francis G. Caffey, United States Attorney (Richard S. Holmes, Special Asst. United States Attorney and Wheaton Augur, Special Asst. United States Attorney, of counsel) for defendant, opposed.

61 MAYER, *District Judge:*

The action is brought to recover an additional estate tax assessed by the Commissioner of Internal Revenue against the Estate of Jonas B. Kissam, deceased, and paid by the plaintiffs as Executrix and Executor of the Last Will and Testament of said Jonas B. Kissam, deceased, to defendant upon compulsion and under protest.

Plaintiffs, as Executors of the Will of Jonas B. Kissam, deceased, on May 16th, 1918, filed their return under the Federal Estate Tax Law (Act of Congress entitled, "An Act to increase the revenue and for other purposes," approved by the President September 8th, 1916, as the same was amended by Title III of the Act of Congress entitled, "An Act to provide increased revenue to defray the expenses of the increased appropriations of the Army and Navy and the extensions of fortifications and for other purposes," approved by the President March 3rd, 1917), and paid a tax of $5,354.14 less a discount of $11.89 for advance payment.

Said return included one-half the value of certain property which was jointly owned by the decedent and the plaintiff Cornelia B. Kissam, to-wit, the one-half from which said decedent received the income in his lifetime.

On May 9th, 1919, the Commissioner of Internal Revenue assumed to impose an additional assessment against said estate by increasing the valuations of said jointly owned property by including also the value of the one-half thereof from which the plaintiff Cornelia B. Kissam derived income, such increases amounting to $202,-
62 812.37 and assumed to impose an additional assessment of tax on said Estate amounting to $13,668.60.

A claim for abatement was duly filed and the Executors on June 13th, 1919, paid the whole additional tax assessed as aforesaid—$13,668.60—under protest, and thereafter, duly demanded a refund of $12,840.69 of the amount so paid, which claim for refund was denied.

The bonds and mortgages and corporate bonds mentioned in the First Cause of Action constitute a portion of said jointly owned property.

On July 15th, 1912, the decedent was the owner of said bonds and mortgages and corporate bonds, and on that day assigned and transferred all of said bonds and mortgages and corporate bonds to John C. Knox.

On July 19th, 1912, Knox assigned and transferred said bonds and mortgages to Jonas B. Kissam (the decedent) and Cornelia B. Kissam (one of the plaintiffs) as joint tenants, and on August 13th, 1912, Knox assigned and transferred said corporate bonds to them as joint tenants in like manner.

The Commissioner of Internal Revenue, in making such additional assessment, assumed to act under Section 202 of said Estate Tax Law, which, so far as material, reads as follows:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of the interest therein held jointly or as
63 tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The question raised by the demurrer to the First Cause of Action is whether, under Section 202 of the Estate Tax Law quoted, the entire value of the bonds and bonds and mortgages should be returned or only the value of the one-half interest therein from which the decedent received the income, the defendant and the Commissioner of Internal Revenue claiming that the entire value of the property should be returned, and the plaintiffs contending that the Federal Estate Tax Law should be construed as not affecting the one-half interest in said property from which said Cornelia B. Kissam always (since 1912) received the income, on the ground that her said one-half interest in said jointly owned property was vested in said Cornelia B. Kissam in individual ownership in July and August 1912, four years before the passage of the Estate Tax Law, and remained her individual property to the time of decedent's death, and wast not, in fact or law, a part of the estate of the decedent.

The First Cause of Action is to recover that portion of such additional tax which is based on the assessment of the Cornelia B. Kissam one-half interest in the bonds and mortgages and corporate bonds, and demands judgment for $11.819.74.

There are four causes of action and defendant has demurred to the First and Fourth.

The demurrer to the first cause of action will here be considered.

64 The bonds and mortgages mentioned in the First Cause of Action were assigned in July and August, 1912, to Jonas B. Kissam and Cornelia B. Kissam by several assignments of mortgage, the granting clauses of which ran to them (who were therein designated as "party of the second part") and to "their survivor, such survivor's executors, administrators and assigns," and the habendum clauses of which assignments ran to them, viz.: "to the party of the second part and to the successors, personal representatives and assigns of said party of the second part forever," and each of said assignments contained a clause after the habendum stating: "It is the intention of this assignment that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bond and mortgage and neither the said Jonas B.

Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

The corporate bonds mentioned in the first cause of action were assigned to them in August, 1912, by one assignment, the granting clause of which ran, "unto the said Jonas B. Kissam and Cornelia B. Kissam, their survivor, such survivor's executors, administrators and assigns," and the habendum clause in which ran to them, "their survivor, such survivor's executors, administrators and assigns forever," and said assignment contains a clause after the habendum reading as follows: "It is the intent of this instrument that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bonds and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

65 In New York,

"Every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be a joint tenancy."

Real Property Law of New York, L., 1909, Ch. 52, Section 66.

In Mills vs. Husson, 140 N. Y., 99, 104, it was held:

"The statute declaring that every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be a joint tenancy, applies to personal estate."

In Overheiser vs. Lackey, 207 N. Y., 229, 233, the court said:

"It was held at an early date, however, in this State that the provision of the Revised Statutes which has been quoted did not necessarily require that the words 'joint tenancy' should be used in a grant or devise to create an estate of that character provided any other expression clearly importing such an intent was employed * * *"

It is clear from the language used in the instruments, supra, that the ownership of the securities was one of joint tenancy, with right of survivorship.

66 The nature and character of a joint tenancy has naturally been often defined from Coke on Littleton, Section 288 (186*a*) and Section 281 (182*a*) to the modern writers.

Blackstone's Commentaries, Book II, Chap. XII, Paragraph II;
(Chase's Blackstone, 3rd Ed., page 363);
Reeves on Real Property, § 680;
Tiedeman on Real Property, § 117;
Schouler's Personal Property (1884), §§ 160 and 163.

That "there is a joint ownership of personal property analogous to a joint estate in lands" is well recognized by the New York Courts.

Matter of McKelway, 221 N. Y., 15, 18.

The legal status of such an ownership is succinctly stated by Judge Pound in the McKelway case, supra:

"Joint tenants, by reason of the combination of entirety of interest with the power of transferring in equal shares, are said to be seized per my et per tout, or by the half and the whole, but tenants by the entirety are seized per tout et non per my, and the conveyance by either husband or wife will have no effect against the other if survivor (Hiles vs. Fisher, 144 N. Y., 306). Upon the vesting of an estate by the entirety, both tenants become seized of the whole estate and upon the death of one the survivor acquires no new or additional interest by survivorship (Matter of Klatzl, supra).

67 But joint ownership in personal property may be severed by the act of one in disposing of his interest. If the interest of one joint owner passes to a third party he and the other joint tenant become tenants in common. The doctrine of survivorship applies only if the jointure is not severed (Williams on Personal Property, pages 302-306). The undivided half of this joint property which Mr. McKelway might have effectually disposed of at any time during his life never passed into the absolute ownership of his wife until her husband's death."

The clause in the asignment, supra, "It is the intent of this instrument * * * that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto," cannot be considered as in restraint of alienation or transfer. If so, it would be void. It must be construed either as an idle promise, so far as concerned survivorship or as a recognition of the power of each to sever the jointure by assigning his or her interest and an agreement not to exercise this power. Whether such agreement would be valid or effective is here immaterial.

The situation, therefore, is that Cornelia B. Kissam owned one-half the property. This she had the right to dispose of and from this she received the income. "She gained nothing in regard thereto by the death of her husband except as the jus accrescendi eliminated his interest."

Matter of McKelway, supra;
Matter of Teller, 178 App. Div., 450, 453.

68 Matter of Moebus, 178 App.. Div., 709,
Blackstone's Commentaries, Book II, Chap. XII, paragraph II.
Chase's Blackstone, 3rd Ed., page 362.

The tax imposed by Section 202, supra, is clearly a succession tax. Randolph vs. Craig, 267 F. R., 993. If construed retroactively, from one standpoint it would impose a tax on property owned by Cornelia Kissam prior to the passage of the act and might be open to serious constitutional objections on the ground that it imposed a direct tax without apportionment among the States.

If construed prospectively, it might be upheld on the theory of Matter of Dolbeer, 226 N. Y., 623.

"In Matter of McKelway (221 N. Y., 15) it was held that even when the joint account was created prior to the adoption of the statute, the transfer by survivorship was taxable to the extent of one-half the joint property. When the joint account is created subsequent to the adoption of the statute, the privilege of acquiring the entire property by the right of succession may be subjected to the tax on the method of acquisition (Matter of Vanderbilt, 172 N. Y., 69, 73, Matter of Keeney, 194 N. Y., 281; 222 U. S., 525). The right to take property by survivorship is the creation of law upon which the state may impose conditions (Matter of Dows, 167 N. Y., 227; Matter of White, 208 N. Y., 64, 67), if no vested or contract rights are thereby violated.

69 The record does not disclose who furnished the money which was deposited to the joint credit. Nothing indicates that the succession in this case was not donative in character (Matter of Orvis, 223 N. Y., 1, 7), and we may well reserve consideration of the application of the statute to a case where the survivor had previously acquired his interest for value.

Matter of Dolbeer, supra.

It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of "every decedent dying after the passage of this Act;" but the assumption must be that this relates to estates thereafter created and not to then existing vested property.

If it be argued that in taxing the succession or transfer involved in the passing of the interest of Jonas to Cornelia, the measure of the tax was the extent of the interest of both, the result is the same.

At the time the statute was passed Cornelia Kissam's interest belonged to her.

In other words, the time of the transfer of the interest which Cornelia Kissam got from Jonas Kissam, in his lifetime, had passed. From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control.

When viewed prospectively, Congress would have the power to tax the privilege of a survivor of acquiring the entire property

70 by the instrumentality of a joint tenancy. When viewed retroactively, it must be assumed that Congress would regard as the original owner of the "part" the surviving joint tenant who prior to the passage of the Act was vested with or possessed of legal title, whether such ownership was the result of a gift or of a contribution of the "part" of the property embraced within the joint tenancy.

The view, here expressed, is, perhaps, more favorable to the Government than that entertained in Randolph vs. Craig, supra. If correct, the statute will be workable from a practical standpoint and what may prove to be serious objections will be avoided.

Motion granted.

December 29, 1920.

J. M. MAYER,
District Judge.

71 *Order Sustaining Demurrer.*

At a Stated Term of the United States District Court for the Southern District of New York Held in the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 14th Day of January, 1921.

Present: Hon. Julius M. Mayer, District Judge.

L. 22-28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

The issues of law raised by the demurrer of the defendant to the first cause of action set forth in the bill of complaint of the plaintiffs herein, having duly come on to be heard, on the plaintiffs'
72 motion for judgment on the pleadings, by this Court, at a Stated Term thereof, and after hearing Stark B. Ferris, Esq., in support of said motion, and Richard S. Holmes, Esq., Special Assistant United States Attorney, of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon, and the Court having handed down its opinion granting said motion:

Now, on motion of Stark B. Ferriss, Esq., attorney for the plaintiffs, it is

Ordered, that the said demurrer be and the same is hereby overruled; and it is

Further ordered, that the plaintiffs have final judgment against the defendant on the merits for the relief prayed for in the first cause of action set forth in their bill of complaint and for their costs to be taxed.

JULIUS M. MAYER,
U. S. District Judge.

I hereby certify pursuant to Section 989 of the Revised Statutes that it appears from the record herein that there was probable cause moving the defendant for the acts done by him wherefor the judgment is due and recoverable against him, and further that the said acts were done under the direction of the Secretary of the Treasury.

JULIUS M. MAYER,
U. S. District Judge.

73 *Final Judgment on First Cause of Action.*

United States District Court, Southern District of New York.

L. 22-28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissom, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

The issues of law raised by the demurrer of the defendant to the First Cause of Action set forth in the bill of complaint of the plaintiffs herein, having duly come on to be heard, on the plaintiffs' motion for judgment on the pleadings, before the Honorable Julius M. Mayer, United States District Judge, at a Stated Term of this Court, and after hearing Stark B. Ferriss, Esq., in support of said motion, and Richard S. Holmes, Esq., Special Assistant United States Attorney, of counsel for the defendant, in opposition thereto, and the Court having handed down its opinion granting said
74 motion, and an order having been duly entered on the 14th day of January, 1921, overruling said demurrer to the First Cause of Action set forth in the bill of complaint of the plaintiffs herein, and ordering that the plaintiffs have final judgment against the defendant on the merits for the relief prayed for in the First Cause of Action set forth in their bill of complaint, and for their costs to be taxed, and the plaintiffs' costs having been taxed at the sum of $31.78 and the Court having filed a certificate pursuant to Section 989 of the Revised Statutes certifying that it appears from the record herein that there was probable cause moving the defendant for the acts done by him wherefore the judgment is due and recoverable against him, and further, that the said acts were done under the direction of the Secretary of the Treasury.

Now, on motion of Stark B. Ferris, attorney for the palintiffs, it is

Ordered and adjudged that the plaintiffs, Cornelia B. Kissam and John C. Knox, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, deceased, and said Cornelia B. Kissam Individually and as Sole Beneficiary under said Last Will and Testament, have final judgment against the defendant on the merits for the relief prayed for in the First Cause of Action set forth in the bill of complaint, and that the said plaintiffs recover of the said defendant on said First Cause of Action, the sum of $11,819.74, with interest thereon from June 13th, 1919, amounting to $1,134.70, together with the sum of $31.78 costs as taxed, making in all the sum of $12,986.22.

Judgment signed this nineteenth day of January, 1921.

ALEX. GILCHRIST, JR.,
Clerk.

75 *Assignment of Errors.*

United States District Court, Southern District of New York.

L. 22-28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

Now comes Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, defendant herein, and assigns error in the decision of the United States District Court for the Southern District of New York in the above entitled cause, and in the rendition of the judgment therein, as follows:

1. The Court erred in granting plaintiffs' motion for judgment on the pleadings on plaintiffs' alleged first cause of action and defendant's demurrer thereto.

76 2. The Court erred in overruling the demurrer interposed by defendant to plaintiffs' alleged first cause of action.

3. The Court erred in construing subdivision (*c*) of Section 202 of the Act of Congress approved September 8, 1916.

Wherefore, defendant prays that for the errors aforesaid the judgment entered herein on the 19th day of January, 1921, be reversed with costs.

Dated, New York City, February 2, 1921.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

77 *Petition for Writ of Error.*

United States District Court, Southern District of New York.

L. 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

And now comes Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, defendant herein, and says that on or about the 19th day of January, 1921, this Court entered final judgment herein on the alleged first cause of action set forth in plaintiffs' complaint in favor of said plaintiffs and against said defendant, in which judgment and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of said defendant, all of which errors more fully appear in the assignment of errors filed with this petition.

78 Wherefore, defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as may be just and proper in the premises.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

The foregoing petition is granted and the writ of error allowed. Dated, New York City, February 7, 1921.

AUGUSTUS N. HAND,
United States District Judge.

79 *Citation.*

By the Honorable Augustus N. Hand, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Cornelia B. Kissam and John C. Knox, executrix and executor of the last will and testament of Jonas B. Kissam, deceased, and Cornelia B. Kissam, individually and as sole beneficiary under said last will and testament, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 5th day of March, 1921, pursuant to a writ of error, file in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Richard J. McElligott as late Acting Collector of Internal Revenue for the Third District of New York, is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be
80 corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 7th day of February, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of the Independence of the United States the One Hundred and Forty-fifth.

AUGUSTUS N. HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

81 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

L. 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

vs.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, March 2, 1921.

STARK B. FERRISS,
Attorney for Plaintiffs.
FRANCIS G. CAFFEY,
United States Attorney, Attorney for Defendant.

82 *Clerk's Certificate.*

United States of America, Southern District of New York.

L. 22/28.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Plaintiffs,

vs.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 4th day of March, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-fifth.

ALEX. GILCHRIST, JR.,
Clerk.

32428.

83 At a Stated Term of the United States Circuit Court of Appeals Held in and for the Second Circuit, at the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, on the 31st Day of May, 1921.

Present:

Honorable Henry G. Ward,
Honorable Henry Wade Rogers,
Honorable Martin T. Manton,
Circuit Judges.

RICHARD J. McELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

against

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Defendants-in-Error, Plaintiffs Below.

Order.

Upon the annexed affidavit of Lilian Easton Ely, sworn to the 24th day of May, 1921, and upon the annexed affidavit of Stark B. Ferriss, attorney for defendants-in-error (plaintiffs below), sworn to the 25th day of May, 1921, upon the annexed certificates of the Clerk of the Surrogates' Court of the County of New York, hereto annexed, dated May 25th, 1921, upon the annexed consent of the parties hereto, and upon motion of Stark B. Ferriss, Esq., attorney for defendants-in-error (plaintiffs below), it is

84 Ordered that this action be and the same hereby is continued in the name of John C. Knox, as surviving executor of the last will and testament of Jonas B. Kissam, deceased, and in the names of Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last will and testament of Cornelia B. Kissam, deceased, the said Lilian Easton Ely and Grace Kissam Duryee being hereby substituted as defendants-in-error herein, in the place of said Cornelia B. Kissam individually, who is now deceased, with respect to all the individual rights and individual claims of said Cornelia B. Kissam, as alleged and contended for in or upon the First Cause of Action in the complaint, and that this action be continued, and that the judgment or mandate of this Court issue in all respects and with like effect as if said Lilian Easton Ely and Grace Kissam Duryee, as such executrices, had been duly made parties to this action in place of said Cornelia B. Kissam, now deceased, with respect to her individual rights and claims at or before the time of the argument of this cause in this Court.

H. G. WARD,
U. S. C. J.

We hereby consent to the entry of the foregoing proposed order.

FRANCIS G. CAFFEY,
U. S. Attorney,
Attorney for Plaintiff-in-Error, Defendant Below.

STARK B. FERRISS,
Attorney for Defendants-in-Error, Plaintiffs Below.

Dated, May 26th, 1921.

85 United States Circuit Court of Appeals, Second Circuit.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

against

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Defendants-in-Error, Plaintiffs Below.

Affidavit of Stark B. Ferriss.

STATE OF NEW YORK,
County of New York, ss:

Stark B. Ferriss, being duly sworn, deposes and says:

I am the attorney for the defendants-in-error (plaintiffs below) in this cause.

This is an action at law. The complaint, which is printed in the transcript of the record filed herein, sets forth four causes of action to recover United States Estate Taxes alleged to have been improperly assessed upon or in connection with the transfer of property by Jonas B. Kissam on the occasion of his death which occurred June 2nd, 1917. The plaintiff-in-error (defendant below) demurred to the First and Fourth Causes of Action by separate demurrers, and answered the Second and Third Causes
86 of Action in one answer. Judgment on the pleadings with respect to the First Cause of Action was rendered in favor of the plaintiffs below (defendants-in-error herein), which judgment was entered January 19th, 1921. The cause is now pending in this Court upon writ of error to the United States District Court for the Southern District of New York to review the judgment above mentioned.

Counsel for the plaintiff-in-error (defendant below) and I appeared before this Court on May 9th, 1921, before the argument of this cause and suggested the death of Cornelia B. Kissam on April 28th, 1921, and I moved the Court that counsel be permitted to proceed with the argument, which motion was granted on the understanding that the will of Cornelia B. Kissam was then in my hands, as counsel for the executrices, for probate by the Surrogate of the County of New York, and that the executrices would apply immediately as soon as appointed to be admitted as defendants-in-error herein in place of said Cornelia B. Kissam, deceased, with respect to her individual rights and individual claims. The last will and testament of said Cornelia B. Kissam, deceased, was duly admitted to probate by the Surrogate of New York County on May 19th, 1921, and letters testamentary have been duly issued to

Lilian Easton Ely and Grace Kissam Duryee, the sole executrices named in said will, there being no executor named therein.

I present herewith the affidavit of Lilian Easton Ely requesting, on behalf of herself and of said Grace Kissam Duryee, that they both be admitted as defendants-in-error herein in the place and stead of said Cornelia B. Kissam, deceased, with respect to
87 her individual rights and individual claims, as alleged and contended for in and upon the said First Cause of Action in said complaint, and that this action be continued, and that the judgment or mandate issue in all respects and with like effect as if said Lilian Easton Ely and Grace Kissam Duryee, as such executrices, had been duly made parties to this action in place of said Cornelia B. Kissam, deceased, with respect to her individual rights and claims at or before the time of the argument of the cause in this Court, as above stated.

As attorney for both of said executrices, I hereby join in the request above set forth.

STARK B. FERRISS.

Sworn to before me his 25th day of May, 1921.

LOUISE BONAR,
Comm. of Deeds, N. Y. City, Residing Kings Co.

Cl'k's No. 368, No. 2093.
Cer. Filed Richmond Co.
Queens Co. Cl'k's No. 4505.
N. Y. Co. Cl'k's No. 324, Reg. No. 22124.
Bronx Co. Cl'k's No. 28, Bronx Reg. No. 22028.

My Term expires Oct. 19, 1922.

88 United States Circuit Court of Appeals, Second Circuit.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

against

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Defendants-in-Error, Plaintiffs Below.

STATE OF NEW JERSEY,
County of Monmouth, ss:

Affidavit of Lilian Easton Ely.

Lillian Easton Ely, being duly sworn, deposes and says: My mother, Cornelia B. Kissam, who was one of the defendants-in-error (plaintiffs below) in the above entitled action at law, died April 28th, 1921, leaving a last will and testament which has been

duly admitted to probate by the Surrogate of the County of New York, N. Y., and letters testamentary have been duly issued thereon to my sister, Grace Kissam Duryee, and myself, as the sole executrices named in said will, there being no executor named in said will.

The complaint in this action sets forth four causes of action. The defendant below (plaintiff-in-error herein) demurred to the First and Fourth Causes of Action and answered as to the Second
89 and Third Causes of Action.

As to the Second, Third and Fourth Causes of Action, this action remains at issue, pending and undetermined, in the United States District Court for the Southern District of New York. On the First Cause of Action in said complaint, judgment was rendered in favor of the defendants-in-error (plaintiffs below) by said District Court for the Southern District of New York, which judgment was based upon an order of said Court, dated January 14th, 1921, signed by Honorable Julius M. Mayer, District Judge, and which judgment was signed and entered January 19th, 1921. This action is now pending in this Court upon said First Cause of Action upon writ of error to the District Court of the United States for the Southern District of New York, to review the said judgment entered as aforesaid. Argument in this Court on the questions of law involved was had on May 10th, 1921, and the matter remains pending in this Court.

On behalf of said Grace Kissam Duryee, as executrix as aforesaid, and on my own behalf, as executrix as aforesaid, I hereby respectfully request that said Grace Kissam Duryee and myself, as executrices of the last will and testament of Cornelia B. Kissam, deceased, be made defendants-in-error herein in place of said Cornelia B. Kissam, with respect to all the individual rights and individual claims of said Cornelia B. Kissam, as alleged and contended for in or upon said First Cause of Action in said complaint, and that this cause of action be continued and that the judgment or mandate of this Court issue in all respects and with like effect as if
90 said Grace Kissam Duryee and myself, as such executrices, had been duly made parties to this action in place of said Cornelia B. Kissam with respect to her individual rights and claims at or before the time of the said argument in this cause in this Court, as above stated.

LILIAN EASTON ELY.

Sworn to before me this 24th day of May, 1921.

WILLIAM N. CALLAHAN,
Notary Public for New Jersey.

Commission expires April 23, 1925.

STATE OF NEW JERSEY,
County of Monmouth, ss:

I, Joseph McDermott, Clerk of the County of Monmouth (and also Clerk of the Circuit Court and Court of Common Pleas, the same being a Court of Record of the aforesaid County, having by law a seal),

Do hereby certify, That William N. Callahan, Esquire, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a Notary Public, duly commissioned and sworn and residing in said County and was as such Notary an officer of said State, duly authorized by the laws thereof to take and certify the same as well as to take and certify the proof and acknowledgment of deeds or conveyances for lands, tenements or hereditaments and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; and I further Certify that I am well acquainted with his handwriting and verily believe the signature to the attached certificate
91 is his genuine signature.

In witness whereof, I have hereunto set my hand and affixed my official seal this 24 day of May 1921.

[SEAL.] JOSEPH McDERMOTT,
Clerk.

No. 267,495.

The people of the State of New York to all to whom these presents shall come *of* may concern:

Know ye, That we, having inspected the Records of our Surrogates' Court in and for the County of New York, do find that on the 23rd day of May, in the year one thousand nine hundred and twenty-one by said Court, Letters *of* Testamentary on the estate of Cornelia Bartlett Kissam, late of the county of New York, deceased, were granted unto Grace Kissam Duryee of Los Angeles, Cal., (in conjunction with Lilian Easton Ely, who heretofore qualified) the Executrix named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

In testimony whereof, we have caused the Seal of the Surrogates' Court of the County of New York to be hereunto affixed.

Witness, Honorable John P. Cohalan, a Surrogate of our said County, in The City of New York, the 25th day of May in the year of our Lord one thousand nine hundred and twenty-one.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

92 United States Circuit Court of Appeals for the Second Circuit, October Term, 1920.

No. 246.

Argued May 10, 1921. Decided June 30, 1921.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

vs.

CORNELIA B. KISSAM and JOHN C. KNOX, as Executrix and Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and said Cornelia B. Kissam, Individually and as Sole Beneficiary under said Last Will and Testament, Defendants-in-Error, Plaintiffs Below.

In Error to the District Court of the United States for the Southern District of New York.

Before Ward, Rogers and Manton, Circuit Judges.

Francis G. Caffey, Esq., U. S. Attorney, and Richard S. Holmes, Esq., Special Assistant, for plaintiff-in-error;
Stark B. Ferriss and Joseph T. Stearns, Esqrs., for defendants-in-error.

93 WARD, *C. J.*:

July 15, 1912, Jonas B. Kissam assigned ten certain bonds and mortgages of individuals and certain bonds of corporations owned by him to John C. Knox, and subsequently Knox assigned them to Jonas B. Kissam and his wife Cornelia. In the instruments of assignment Knox as party of the first part assigned the bonds and mortgages

"to the party of the second part, their survivor, such survivor's executors, administrators and assigns"

and to hold

"to the party of the second part, the survivor of them and to the successors, personal representatives and assigns of the said party of the second part forever";

and it was further stated that

"It is the intention of this assignment that the survivor of the said Jonas B. Kissam and Cornelia B. Kissam shall become the absolute owner of said bond and mortgage and that neither the said Jonas B. Kissam nor the said Cornelia B. Kissam shall have power to affect the right of the survivor thereto."

The instrument of assignment of the corporate bonds contained the same provisions.

All parties concede that the ownership was at least joint and that it could have been severed and turned into a tenancy in common by either party notwithstanding the reservation that neither party could affect the right of the survivor.

June 2, 1917, Kissam died leaving all his estate to his wife Cornelia, she and John C. Knox being executors of the will.

The Act of September 8, 1916, known as the Estate Tax Law, as amended by the Act of March 3, 1917, provides:

94 "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

One per centum of the amount of such net estate not in excess of $50,000; * * *.

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated;

(*a*) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(*b*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth, * * *

(*c*) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent, * * *

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

95 (*a*) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdic-

tion, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000, * * *."

The executors included in their return to the Commissioner of Internal Revenue one-half of said joint property in the decedent's gross estate as being his property and paid the transfer tax on the net estate so ascertained, but the Commissioner reviewed their return and included the whole of the joint property in the gross estate and assessed the net estate returned in this way.

The executors paid the additional tax under protest and after unsuccessfully seeking to obtain a refund brought this action, the complaint containing four causes of action of which the first involved the considerations above mentioned. They claimed that the assessment was void as to the half of the joint property which vested in Cornelia before the passage of the Act of September 8, 1916, as amended, and also that the Act itself was unconstitutional as a direct tax upon property without apportionment among the several states as required by Article 1, Section 9, subdivision 4 of the Constitution.

96 The executors moved for judgment on the first cause of action, which motion the District Court granted and the collector has sued out this writ of error.

We point out in the first place that the practice pursued was wholly erroneous. What has become of the three causes of action as to which there was no answer or demurrer? Judgment should have been entered in favor of the executors on the merits on the first cause of action, and by default upon the second, third and fourth causes of action. Actions at law cannot be brought up in the Federal Courts by writ of error piecemeal; the whole controversy must be settled in one final judgment. As the judgment will be reversed, the whole controversy can be disposed of upon a new trial.

The joint property mentioned in Section 202, subdivision *c* is included as a measure of the tax payable by the estate for the decedent's privilege of disposing of his property by will or intestacy. It is an excise tax and not a direct tax upon property (New York Trust Co. vs. Eisner, 263 Fed. Rep., 620; Prentiss vs. Eisner, 260 Fed. Rep., 589; 267 Fed. Rep., 16.) The language of the subdivision plainly applies to property in which the decedent was interested jointly with any other person, and all of which was originally his, i. e. any part of the property which originally belonged to such other person and never at any time belonged to the decedent is not to be included. The expression "originally" refers not to the time of death, but to the time the joint interest was created. So the words "never to have belonged to the decedent" mean at any time before the creation of the joint estate. The act takes effect upon the death; it does not become retroactive because it measures a transfer tax payable by the estate in part by property which the decedent has given away in his life time. This seems to us perfectly fair, and an answer to the constitutional objection.

Judgment reversed.

97 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 11th Day of July, One Thousand Nine Hundred and Twenty-one.

Present:

Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Hon. Martin T. Manton,
Circuit Judges.

RICHARD J. MCELLIGOTT, Late Acting Collector, etc., Plaintiff in Error,

v.

CORNELIA B. KISSAS and JOHN C. KNOX, as Executors, etc., Defendants in Error.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it is hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
M. T. M.

Endorsed: United States Circuit Court of Appeals, Second Circuit. R. J. McElligott v. C. B. Kissam and ano. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 11, 1921. William Parkin, Clerk.

98 United States Circuit Court of Appeals for the Second Circuit.

No. 246-1920.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

vs.

JOHN C. KNOX, as Surviving Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Lilian Easton Ely and Grace Kissam Duryee, as Executrices of the Last Will and Testament of Cornelia B. Kissam, Deceased, Defendants-in-Error, Substituted for Plaintiffs Below.

Petition for Writ of Error.

Your petitioners, John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, defendants-in-error in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment has therein been rendered on the eleventh day of July, one thousand nine hundred twenty-one, reversing a judgment of the District Court of the United States for the Southern District of New York, and that the matter in controversy in said suit exceeds $1,000, one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the criminal laws, nor solely under the revenue laws, and that it is not an admiralty case, and that this cause on the face of the complaint involves questions as to whether
99 certain sections of the Estate Tax Law of the United States (Act of Congress approved September 8, 1916) are repugnant to or in conflict with the provisions of the Constitution of the United States and the Fifth Amendment to said Constitution, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be allowed them in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said case with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said defendants-in-

error may be reviewed, and if error be found corrected according to the laws and customs of the United States.

JOHN C. KNOX,
Surviving Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, Lilian Easton Ely, and Grace Kissam Duryee, Executrices of the Last Will and Testament of Cornelia B. Kissam, Deceased,
By STARK B. FERRISS,
Their Attorney.

The foregoing petition is granted and writ of error allowed as prayed for, on the giving of a bond in the sum of $250.00 according to law.

HENRY WADE ROGERS,
United States Circuit Judge.

Dated, New York City, October 7, 1921.

100 SIR:

Please take notice that the within is a copy of a Petition for Writ of Error etc. this day duly entered and filed in the within entitled action in the office of the Clerk of U. S. Circuit Court of Appeals for the Second Circuit.

Yours, etc.,

STARK B. FERRISS,
Attorney for Defendants-in-Error.

Office and P. O. Address, 165 Broadway, Borough of Manhattan, City of New York, N. Y.

Dated, New York, October 8th, 1921.

To William Hayward, Esq., Attorney for Plaintiff-in-Error.

Service of a Copy of the within Petition for Writ of Error, etc., is hereby admitted this — day of October, 1921.

____ ____,
Attorney for Plaintiff-in-Error.

[Endorsed:] Copy. U. S. Circuit Court of Appeals for the Second Circuit. Richard J. McElligott, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below, vs. John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, defendants-in-Error, substituted for Plaintiffs Below. Petition for Writ of Error and Notice of Filing. Stark B. Ferriss, Attorney for Defendants-in-Error, 165 Broadway, New York. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 8, 1921. William Parkin, Clerk.

101 United States Circuit Court of Appeals for the Second Circuit.

No. 246-1920.

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below,

vs.

JOHN C. KNOX, as Surviving Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Lilian Easton Ely and Grace Kissam Duryee, as Executrices of the Last Will and Testament of Cornelia B. Kissam, Deceased, Defendants-in-Error.

Assignment of Errors.

And now comes John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, defendants-in-error herein, by Stark B. Ferriss, their attorney, and assign error in the decision of the United States Circuit Court of Appeals for the Second Circuit, in the above entitled cause, and in the rendition of the judgment therein, as follows:

1. The learned Circuit Court of Appeals erred in reversing the judgment of the District Court of the United States for the Southern District of New York.

2. The learned Circuit Court of Appeals erred in refusing to affirm the judgment of the District Court of the United States for the Southern District of New York for the sum of $11,819.74, with interest thereon from June 13th, 1919, amounting to $1,134.70, together with the sum of $31.78, costs as taxed, making in all the sum of $12,986.22, entered January 19th, 1921, in favor of Cor-
102 nelia B. Kissam and John C. Knox, as executrix and executor of the Last Will and Testament of Jonas B. Kissam deceased, and said Cornelia B. Kissam, individually and as sole beneficiary under said Last Will and Testament and against said Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York.

3. The learned Circuit Court of Appeals erred in construing subdivision (*c*) of Section 202 of said "The Estate Tax Law" as applying to the whole of the joint estates created in July and August 1912, more than four years before the passage of said law.

4. The learned Circuit Court of Appeals erred in deciding that the provisions of said "The Estate Tax Law" and particularly the provisions of subdivision (*c*) of Section 202 thereof if and as applied to estates created in July and August 1912 more than four years before the passage of the law are not repugnant to the provisions of the Constitution of the United States which prohibit the

levying of a direct tax upon property without apportionment among the States.

5. The learned Circuit Court of Appeals erred in deciding that the value of the entire property transferred by assignments from John C. Knox to Jonas B. Kissam and Cornelia B. Kissam in July and August 1912, more than four years before the passage of The Estate Tax Law, should be added to and included with the value of the property of which said Jonas B. Kissam died seized and possessed, for the purpose of arriving at the valuation of the gross estate of the decedent, on the basis of which valuation (subject to exemption and deductions) the Estate Tax upon the estate of said decedent was measurued.

103 6. The learned Circuit Court of Appeals erred in deciding that the provisions of said "The Estate Tax Law", and particularly the provisions of subdivision (*c*) of Section 202 thereof, if and as construed and applied in this cau - to estates created in July and August 1912, more than four years before the passage of said law, are not repugnant to the provisions of the Constitution of the United States or of the Fifth Amendment thereto which prohibit the taking of private property without due process of law.

7. The Court erred in deciding that The Estate Tax Law construed as requiring the total value of the entire property transferred and assigned to Jonas B. Kissam (the decedent) and Cornelia B. Kissam as joint owners by John C. Knox in July and August 1912 to be included with the property of which said Jonas B. Kissam died seized and possessed for the purpose of fixing the amount of the Estate Tax on the estate of said decedent, does not violate any provision of the Constitution of the United States or of any amendment thereto

8. The learned Circuit Court of Appeals erred in deciding that the Estate Tax Law is applicable to the whole of said joint estate created by said assignments from John C. Knox to Jonas B. Kissam and Cornelia B. Kissam in July and August 1912, in that the Estate Tax Law so construed would be repugnant to the provisions of the Constitution of the United States, prohibiting the passing by Congress of ex post facto laws.

9. The learned Circuit Court of Appeals erred in deciding that more than one half of the total value of the joint estate created as aforesaid in July and August 1912 should be included in with and as a part of the Estate of Jonas B. Kissam, deceased, for the purpose of fixing the Estate tax payable by said Estate.

104 10. The learned Circuit Court of Appeals erred in construing the word or expression "originally" as used in subdivision (*c*) of Section 202 of said "Estate Tax Law" as meaning "at the time the joint Estate was created."

11. The learned Circuit Court of Appeals erred in deciding that the words "never to have belonged to the decedent" as used in sub-

division (*c*) of Section 202 of the Estate Tax Law mean "never at any time before the creation of the joint Estate."

12. The learned Circuit Court of Appeals erred in deciding that the Estate Tax Law does not become retroactive because it measures the Estate tax payable by the Estate of Jonas B. Kissam deceased in part by property given away by said Jonas B. Kissam in his lifetime and prior to the passage of said Estate Tax Law.

Wherefore, defendants-in-error pray that for the errors aforesaid the judgment entered herein on the 11th day of July 1921, be reversed with costs, and that the judgment of the District Court of the United States for the Southern District of New York be affirmed with costs.

STARK B. FERRISS,
Attorney for Defendants-in-Error.

Dated, New York City, October 7th, 1921.

105–108 SIR:

Please take notice that the within is a copy of an Assignment of Errors this day duly entered and filed in the office of the Clerk of the U. S. Circuit Court of Appeals for the Second Circuit.

Yours, etc.,

STARK B. FERRISS,
Attorney for Defendants-in-Error.

Office and P. O. Address, 165 Broadway, Borough of Manhattan, City of New York, N. Y.

Dated, New York, October 8th, 1921.

To William Hayward, Esq., Attorney for Plaintiff-in-Error.

Service of a Copy of the within Assignment of Errors is hereby admitted this — day of October 1921.

ATTORNEY FOR PLAINTIFF-IN-ERROR.

[Endorsed:] Copy. U. S. Circuit Court of Appeals for the Second Circuit. Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, Plaintiff-in-Error, Defendant Below, vs. John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, Defendants-in-Error, Substituted for Plaintiffs Below. Assignment of Errors and Notice of Filing. Stark B. Ferriss, Attorney for Defendants-in-Error, 165 Broadway, New York. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 8, 1921. William Parkin, Clerk.

* * * * * * *

109 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 108 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of R. J. McElligott, as late Acting Collector, etc., against John C. Knox, as Surviving Ex'r etc., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 13th day of October in the year of our Lord One Thousand Nine Hundred and Twenty-one and of the Independence of the said United States the One Hundred and forty-sixth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

110 UNITED STATES OF AMERICA, *ss:*

By the Honorable Henry Wade Rogers, one of the judges of the United States Circuit Court of Appeals for the Second Circuit, to Richard J. McElligott, as late acting collector of internal revenue for the third district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, are plaintiffs-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiffs-in-error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the Circuit above named, this 7th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of the Independence of the United States the One Hundred and Forty-sixth.

HENRY WADE ROGERS,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

110½ [Endorsed:] United States Supreme Court. John C. Knox, as surviving executor of the last Will and Testament of Jonas B. Kissam, deceased, and Lilian Easton Ely and Grace Kissam Duryee, as executrices of the last Will and Testament of Cornelia B. Kissam, deceased, Plaintiffs-in-Error, vs. Richard J. McElligott, as late Acting Collector of Internal Revenue for the Third District of New York, Defendant-in-Error. Citation. Stark B. Ferriss, Attorney for Pl'ffs-in-Error, 165 Broadway, New York. A copy of the within notice has been this day received in this office. Oct. 8, 1921. Wm. Hayward. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 8, 1921. William Parkin, Clerk.

SIR:

Please take notice that the within is a copy of a — this day duly entered and filed in the office of the Clerk of this Court at the County Court House in ——, in the County of ——, State of New York.

Yours, etc.,

STARK B. FERRISS,
Attorney for —— ——.

Office and P. O. Address, 165 Broadway, Borough of Manhattan, City of New York, N. Y.

Dated, New York, —— —, 19—.

To William Hayward, Esq., Attorney for Defendant-in-Error.

Service of a Copy of the within Citation is hereby admitted this 8th day of October, 1921.

—— ——,
Attorney for Defendant-in-Error.

111 Supreme Court of the United States, October Term, 1921.

No. 602.

JOHN C. KNOX, as Surviving Executor of the Last Will and Testament of Jonas B. Kissam, Deceased, and Lilian Easton Ely and Grace Kissam Duryee, as Executrices of the Last Will and Testament of Cornelia B. Kissam, Deceased, Plaintiffs-in-Error,

against

RICHARD J. MCELLIGOTT, as Late Acting Collector of Internal Revenue for the Third District of New York, Defendant-in-Error.

Stipulation.

It is hereby stipulated between the parties hereto, that the following portions of the record in this cause need not be reproduced in the printed record, and that the Transcript of Record filed in the office of the Clerk of this Court on October 29th, 1921, omitting the portions

thereof hereinafter referred to, shall constitute the Transcript of Record on Writ of Error herein and be printed as such, said portions to be omitted being designated as follows, to-wit:—Second, Third and Fourth Causes of Action in the Complaint, being a part of folio 58 and all of folios 59 to 116 inclusive, as such folios are found in the printed Transcript of Record of this cause on Writ of Error to the District Court of the United States; also all of folio 118 and that portion of folio 119 ending "June 1919;" also Schedule C, which is folio 152 and the first line of folio 153; also subdivisions I, III and IV of Schedule D, being folios 154, 155, a portion of 156, all of 163,
164, 165; also folios 166 and 167 ending with the figures
112 "$225,500.15;" also folios 169 and that portion of folio 170
ending with the figures "$12,840.00;" all as found in said printed Transcript of Record; also omit the bond of Lilian Easton Ely and the Fidelity and Deposit Company of Maryland to Richard J. McElligott, and all statements and affidavits attached thereto, and insert in lieu of said bond and statements and affidavits, the following:

"Bond of Lilian Easton Ely, as Principal, and the Fidelity and Deposit Company of Maryland, as Surety, to Richard J. McElligott, in the sum of Two Hundred and fifty ($250) Dollars, dated October 6th, 1921, and approved as to sufficiency and form October 7th, 1921, by Honorable Henry Wade Rogers, Judge United States Circuit Court of Appeals, was duly delivered and filed with the Clerk of the United States Circuit Court of Appeals, Second Circuit, October 8th, 1921."

STARK B. FERRISS,
Attorney for Plaintiffs-in-Error.
JAMES M. KECK,
Attorney for Defendant-in-Error.

Endorsed on cover: File No. 28,557. U. S. Circuit Court Appeals, 2d Circuit. Term No. 602. John C. Knox, as surviving executor of the last will and testament of Jonas B. Kissam, deceased, et al., plaintiffs in error, vs. Richard J. McElligott, as late collector of internal revenue for the third district of New York. Filed October 29th, 1921. File No. 28,557.

IN THE

Supreme Court of the United States

October Term, 1921.

No. 602.

JOHN C. KNOX, as surviving Executor of the Last Will and Testament of Jonas B. Kissam, deceased, et al.,

Plaintiffs-in-Error,

vs.

RICHARD J. McELLIGOTT, as late Acting Collector of Internal Revenue for the Third District of New York,

Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

STARK B. FERRISS,
Attorney for Plaintiffs-in-Error.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

October Term, 1921.

No. 602.

JOHN C. KNOX, as surviving Executor of the Last Will and Testament of Jonas B. Kissam, deceased et al.,
Plaintiffs-in-Error,

vs.

RICHARD J. MCELLIGOTT, as late Acting Collector of Internal Revenue for the Third District of New York,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFFS-IN-ERROR.

The cause comes here on writ of error to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment entered in said court on July 11, 1921, reversing a judgment of the United States District Court for the Southern District of New York, in favor of Cornelia B. Kissam and John C. Knox, as executrix and executor of Jonas B. Kissam, deceased, and said

Cornelia B. Kissam, individually and as sole beneficiary under his will, upon demurrer by defendant (the defendant-in-error here) to the first cause of action set forth in the complaint (pages 1-2).

This action was brought in the U. S. District Court for the Southern District of New York to recover (so far as material herein) the sum of $11,819.74, assessed by the Commissioner of Internal Revenue, as an additional estate tax on the Estate of Jonas B. Kissam, deceased, and paid under protest by the executors of the last will and testament of said decedent to Richard J. McElligott, as Acting Collector of Internal Revenue for the Third District of New York (pages 3-12).

THE QUESTION INVOLVED.

A husband owning bonds, mortgages and corporate bonds, assigned and transferred them on July 15th, 1912, to another, who in July and August, 1912, more than four years prior to the passage of the Estate Tax Law (Act of September 8th, 1916; 39 Stat., 777), assigned and transferred said securities to a husband and wife as joint owners, with right of survivorship, all the parties residing in the State of New York and the property and all transactions being in said state (pages 5-6). The question is, whether, on the death of the husband on June 2nd, 1917, page 4), the half interest in the joint property which the surviving wife had owned since the creation of the estates in 1912, should, under the provisions of Section 202, Clause (c) of said law, be included as a part of the gross estate of the deceased husband for the purpose of fixing the estate tax payable by said Estate.

A STATEMENT OF THE ESSENTIAL FACTS.

On July 15, 1912, Jonas B. Kissam, who resided with his wife Cornelia B. Kissam in the City and State of New York, was the owner of certain bonds of individuals secured by mortgages on real estate and bonds of railroads and other corporations, all of which securities he, on that date, assigned and transferred to John C. Knox, by ten several assignments of the bonds and mortgages and by one assignment of all the corporate bonds.

On July 19, 1912, said Knox, by ten several assignments, assigned and transferred said bonds and mortgages to said Jonas B. Kissam and Cornelia B. Kissam, as joint owners with right of survivorship.

On August 13, 1912, said Knox sold, assigned and transferred to said Jonas B. Kissam and Cornelia B. Kissam, as joint owners with right of survivorship, all the corporate bonds, by one assignment. In the assignments of mortgages to Mr. and Mrs. Kissam they were both described as the "party of the second part" and the assigments ran "to the party of the "second part and to the successors, personal repre- "sentatives and assigns of the party of the second "part, forever." The blanket assignment of the corporate bonds also ran to them, "their survivors, "such survivor's executors, administrators and "assigns." In all the assignments were clauses to the effect that it was the intention that the survivor should become the absolute owner of the property assigned and that neither of the assignees "shall have power to affect the right of "the survivor thereto" (pages 5-6) and (pages 14-18).

It has been admitted in the courts below that the clauses last above mentioned were void as an unlawful restraint on alienation, thus leaving the assignments to be construed as if such restraining clauses were absent.

N. Y. State Constitution, Article I, §15;
Gray on Restraints on Alienation of Property, 2nd Ed., §27, page 18;
Booker vs. Booker, 119 App. Div., 482.

The joint ownerships created on the delivery of said several assignments by Knox to Jonas B. Kissam and Cornelia B. Kissam in July and August, 1912, continued until the death of said Jonas B. Kissam on June 2, 1917, except that there was one substitution during the interval of twenty corporate bonds of the Interborough Rapid Transit Company, due in 1952, for twenty other bonds issued by the said company, due in 1966, which last mentioned bonds were held on the same terms and conditions, and in the same ownership, as were the Interborough bonds which were payable in 1952 (page 7).

Said Jonas B. Kissam left a Last Will and Testament which was admitted to probate by the Surrogate of New York County on June 18, 1917, and Letters Testamentary were duly issued to the widow Cornelia B. Kissam and to John C. Knox, the executrix and executor of said Will, who duly qualified as such. Said Cornelia B. Kissam was the sole legatee, devisee and beneficiary under said Last Will and Testament (page 4).

On or about the 7th day of December, 1917, said executrix and executor duly made and executed the Return for the Federal estate tax on the estate of said Jonas B. Kissam, on Form 706 furnished

by the Collector of Internal Revenue for the Third District of New York for that purpose, and filed the same, in duplicate, on or about December 10, 1917, in the office of said Collector (pages 7-8). They included in said Return the value of the one-half of said jointly owned property which was owned and enjoyed by the decedent, but did not include the value of the one-half of said jointly owned property which had been owned and enjoyed by the wife, Cornelia, since the creation of the joint estates in July and August, 1912.

The tax of $5,354.14, based upon the said Return, less a small rebate for advance payment, was paid by said executrix and executor on May 16, 1918 (page 8). On May 9, 1919, the Commissioner of Internal Revenue, after reviewing and auditing said Return, increased the valuation of the decedent's estate by adding the sum of $149,925.74 representing the value of the one-half interest of said Cornelia B. Kissam in the bonds and mortgages mentioned, and by adding the sum of $52,886.63 representing the value of said one-half interest of Cornelia B. Kissam in the corporate bonds mentioned, such increases amounting to $202,812.37 and said Commissioner having also made certain other increases in valuations, he thereupon assumed to impose an additional assessment of $13,668.60 against the said estate under the provisions of the Estate Tax Law, which additional assessment amounted with reference to the increased valuations of $202,812.37 above mentioned, to the sum of $11,819.74 (page 8). The Commissioner of Internal Revenue, by letter dated May 16, 1919, addressed and delivered to said executors, demanded payment of said additional tax (page 9) and on May 31, 1919, the executors filed a claim for the

abatement of said increased assessment and, no ruling being made thereon, they paid the additional tax demanded, under protest, on June 13, 1919 (pages 8-9).

On July 12, 1919, the executrix and executor took an appeal to the Commissioner of Internal Revenue and demanded the refund of $12,840.69 of said additional tax, $11,879.74 thereof being claimed because of the increased valuations of $202,812.37 above mentioned and the balance of the refund claimed being based on the facts alleged in the other causes of action, which claim for refund was, on October 20, 1919, denied and rejected by the Commissioner of Internal Revenue (pages 9-10); whereupon this action was brought in the United States District Court for the Southern District of New York to recover the amount of said tax so far as the same is based upon the valuation of the wife's half interest in said jointly owned property.

The defendant (the defendant-in-error here) demurred to the first cause of action in the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action (page 20). Motion was made by plaintiffs for judgment on the pleadings, the matter was argued before Honorable Julius M. Mayer, then judge of said District Court, and judgment was rendered for plaintiffs for $12,986.22, which judgment was entered January 19, 1921 (page 27). Judge Mayer handed down an opinion, which is in the transcript of record (pages 21-25). This opinion was not reported. Said judgment was reviewed by the United States Circuit Court of Appeals for the Second Circuit, on writ of error, which court by its judgment entered and filed July 11, 1921, reversed the

judgment of the District Court (page 40). The opinion of the Circuit Court of Appeals, written by Judge Ward, is in the transcript of the record (pages 27-39). Said opinion is also reported in 275 Federal 545.

Counsel have stipulated that the trial of the second and third causes of action be postponed until the final determination of the first cause of action, as the disposition of said causes of action will be practically controlled by the decision herein. The fourth and only remaining cause of action has been dismissed.

While the cause was pending in the Circuit Court of Appeals Cornelia B. Kissam died, and her Last Will and Testament was duly admitted to probate by the Surrogate of New York County, New York, and Letters Testamentary were duly issued to the plaintiffs-in-error Lilian Easton Ely and Grace Kissam Duryee, as executrices of the Last Will and Testament of Cornelia B. Kissam, deceased, and the persons mentioned as such executrices were, by order made by the Circuit Court of Appeals for the Second Circuit, duly substituted as parties to this cause in the place and stead of said Cornelia B. Kissam with respect to her individual rights and individual claims in this cause. (page 32).

THE STATUTE INVOLVED.

The Estate Tax Law (Act of Sept. 8, 1916—39 U. S. Statutes at Large 777) as amended by the Revenue Act of March 3, 1917 (Id. page 1002), provides, among other things as follows:

Sec. 201—That a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act * * *

One and one half per centum of the amount of such net estate not in excess of $50,000;

Three per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Four and one half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Six per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000; * * *

Sec. 202—That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in a case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *

A BRIEF SPECIFICATION OF THE ERRORS RELIED UPON AND OF THE PRINCIPLES OF LAW RELIED UPON FOR REVERSAL.

The assignments of error (pages 43-45) may be briefly summarized as asserting that where a husband owned bonds and mortgages and corporate bonds on July 15th, 1912, and on that day assigned

and transferred said securities to another person, and where such other person on July 19th, 1912, by ten separate assignments, all delivered on or about that day, and on August 13th, 1912, by one assignment delivered that day, assigned and transferred said securities to said husband and his wife as joint owners, with right of survivorship, which ownerships continued until June 2nd, 1917, when the husband died, the entire value of both halves of the jointly owned property should not under Clause (c) of Section 202 of the Estate Tax Law of September 8th, 1916 (39 Stat. 777) be included with and as a part of the gross estate of the deceased husband as a basis for assessing the estate tax upon the estate of said decedent, and that said law, if so construed and applied, is unconstitutional because it would be an ex post facto law, under which private property would be taken as an arbitrary exaction under the guise of a tax without due process of law, and which would also amount, in the case at bar, to the levying of an unapportioned direct tax upon the property.

AS ALL PARTIES TO THE INSTRUMENTS CREATING THE JOINT ESTATES RESIDED IN NEW YORK, AND THE INSTRUMENTS WERE DELIVERED THERE AND THE PROPERTY TRANSFERRED WAS THERE, THE LAW OF THAT STATE IS CONTROLLING AS TO ALL QUESTIONS OF TITLE.

Warburton vs. White, 176 U. S., 484.

In Matter of McKelway, 221 N. Y., 15, the Court held that St. Clair McKelway and his wife,

Virginia B. McKelway, owned jointly certain corporate bonds, and declared the law of New York to be as follows:

> "Mr. and Mrs. McKelway, owned this per-
> "sonal property as joint tenants but not by the
> "entirety. There is a joint ownership of per-
> "sonal property analogous to a joint estate in
> "lands (Overheiser vs. Lackey, 207 N. Y., 229,
> "236), but husband and wife do not take per-
> "sonal property as tenants by the entirety
> "(Matter of Albrecht, 136 N. Y., 91, 94). Joint
> "tenants, by reason of the combination of en-
> "tirety of interest with the power of trans-
> "ferring in equal shares, are said to be seized
> "*per my et per tout,* or by the half and the
> "whole, but tenants by the entirety are seized
> "*per tout et non per my,* and the convey-
> "ance by either husband or wife will have no
> "effect against the other if survivor (Hiles vs.
> "Fisher, 144 N. Y., 306). Upon the vesting
> "of an estate by the entirety, both tenants be-
> "come seized of the whole estate and upon the
> "death of one the survivor acquires no new
> "or additional interest by survivorship(Mat-
> "ter of Klatzl, supra). But joint ownership
> "in personal property may be severed by the
> "act of one in disposing of his interest. If
> "the interest of one joint owner passes to a
> "third party he and the other joint tenant
> "become tenants in common. The doctrine of
> "survivorship applies only if the jointure is
> "not severed (Williams on Personal Property,
> "pages 302-306). The undivided half of this
> "joint property which Mr. McKelway might

"have effectually disposed of at any time dur-
"ing his life never passed into the absolute
"ownership of his wife until her husband's
"death.

"A transfer tax thereon does not diminish
"the value of a vested estate and is free from
"the objections to a tax on vested remainders
"and reversions as set forth in *"Matter of*
"Pell (171 N. Y., 48) or to a tax on contingent
"remainders as set forth in *Matter of Lansing*
"(*supra*).

"As to the one-half which Mrs. McKelway
"herself owned and had the right to dispose
"of, the rule of the *Pell* case must govern.
"She gained nothing in regard thereto by the
"death of her husband except as the *jus accres-*
"cendi eliminated his interest. The right of
"the survivor of two joint tenants of personal
"property to the exclusive ownership thereof
"may be deemed a taxable transfer of one-half
"of the joint property but not to the whole. It
"is taxable only to the extent of the beneficial
"interest arising by survivorship, which is, as
"we have seen, the accruer by survivorship of
"the whole instead of the half. To this extent
"it was a property right fully acquired only
"on survivorship, analogous to an interest
"created by a power of appointment under a
"will executed prior to the enactment of the
"law taxing transfers, and, therefore, one that
"could be cut down by the imposition of an
"excise tax after the joint ownership began
"(*Matter of Vanderbilt*, 50 App. Div., 246;
"163 N. Y., 597). The imposition of such a
"tax violates no contract for neither joint ten-

"ant agrees not to terminate the joint tenacy. "Mrs. McKelway had no contract with her "husband as to the joint property which was "not as ambulatory as a will to the last mo- "ment of Mr. McKelway's life and, for the "purposes of taxation, she is deemed to have "acquired his interest in the joint property "by his death."

The Married Woman's Acts of New York now found in the Domestic Relations Law, Laws of 1909, Chap. 19 contain the following provisions:

§51. POWERS OF MARRIED WOMAN.—A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess

a judgment specified in section one thousand two hundred and seventy-three of the Code of Civil Procedure.

§56. HUSBAND AND WIFE MAY CONVEY TO EACH OTHER OR MAKE PARTITION.—Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by courtesy.

The plaintiffs-in-error refer to the well settled rules of construction that—

(a) Statutes are to be given a prospective interpretation only, unless clear and unmistakable language makes a retrospective interpretation imperative;

(b) Statutes levying taxes are to be construed in favor of the individual and against the Government.

(c) Statutes are to be so construed that absurd unjust or oppressive consequences are avoided, and

(d) The statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.

The plaintiffs-in-error do not now dispute the power of Congress to enact a valid statute under which transfers of property in joint ownership delivered *after* the passage of the Act may be made the basis of an excise tax against the estate of the transferor on the subsequent exercise by the transferor of the privilege to transfer his estate by will or under the intestate laws on the occasion of his death. They contend, however, that as to estates created several years *before* the passage of the Act and not in contemplation of death, the value of property so transferred, and which has not at any time since its original transfer been under the dominion or control of the transferor, cannot properly be added to the estate of the decedent for the purpose of fixing the rate or amount of such an excise tax.

They contend that such an attempt by Congress to tax the right of a citizen to transmit his property on death, being accompanied by the arbitrary provision that the value of the decedent's estate for the purpose of taxation and for the purpose of detemrining the rate of the tax to be imposed shall be fixed by adding to the decedent's actual estate the property held by another person under a title vested long before the passage of the act, amounts to the taking of property by an arbitrary exaction under the guise of a tax without due process of law, and, if it is a tax at all, it is an unapportioned direct tax upon property by reason of its ownership, and violates the provisions of the Constitution and of the Fifth Amendment thereto, and is, therefore, void.

The decisions of the courts below have proceeded upon the fact alleged in paragraph Twenty-

first of the complaint (page 10), that the Commissioner of Internal Revenue and the Collector both acted with respect to the assessment under review, under the provisions of Clause (c) of Section 202 of the Act of 1916.

The Complaint shows (pages 5-7) that the estates were created more than four years prior to the passage of the Act and there is no allegation, statement, presumption or claim that the transfers and assignments creating the joint estate were made in contemplation of death or intended to take effect in possession or enjoyment at or after the decedent's death.

Inasmuch as the questions under consideration are brought up on a demurrer filed by the Collector (the defendant-in-error), the plaintiffs-in-error are entitled to have all facts alleged in the complaint considered in their aspects most favorable to the plaintiffs-in-error.

POINT I.

Clause (c) of Section 202 of the Estate Tax Law, so far as the same relates to the valuation of joint estates in bonds and mortgages and corporate bonds, was intended by Congress to apply only to the beneficial interests which the decedent owned at the time of his death in such joint estates.

The statute is quoted on the foregoing pages of this brief numbered 8 and 9. In view of the argument immediately following, we repeat,

for the convenience of the Court, the portion of Section 202 quoted:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposit-

ed in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent * * *."

Counsel begs leave to refer to the following well-known rules of construction:

As a rule, punctuation is not regarded a part of an enactment and may be disregarded, but it will be resorted to if it tends to throw light on its meaning.

When necessary to give effect to the legislative intent, words in the plural number will be construed to include the singular, and words importing the singular only, will be applied to the plural of persons and things. Sometimes the Court will transpose sentences and sections as an aid in construction.

12 Corpus Juris, 707, and cases cited.

"The words 'and' and 'or' when used in a statute are convertible as the sense may require."

People ex rel. M. G. Co. vs. Rice, 138 N. Y., 151.

"When necessary to harmonize the provisions of a statute, or give effect to all of its provisions, the word 'or' may be read 'and' and conversely."

State vs. Brandt, 41 Iowa, 593.

> "Whenever necessary to effect the obvious intention of the legislature, conjunctive words may be construed as disjunctive, and vice versa."

36 Cyc., 1123, and cases cited.

Section 202 of said Act states that "the term 'person' includes partnerships, corporations and associations."

In *United States* vs. *Field,* 255 U. S., 257, Mr. Justice Pitney said (at page 262) referring to the Estate Tax Law of 1916, that it is an

> "accepted canon that the provisions of such acts are not to be extended by implication (Gould vs. Gould, 245 U. S., 151, 153),"

and on the basis of this rule, held, that in order to make an interest in property subject to taxation under clause (a) of Section 202, all three conditions expressed in said clause must be met, that is, the property "must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate." And said further that "these conditions "are expressed conjunctively; and it would be in- "admissible, in construing a taxing act, to read "them as if prescribed disjunctively. Hence, un- "less the appointed interest fulfilled all three con- "ditions, it was not taxable under this clause." But in a statute imposing a tax, the word "or" may be construed in its copulative and not in its

disjunctive sense, for the purpose of effectuating the intent of the legislature in granting an exemption to a number of classes of corporations named.

Standard Underground Cable Co. vs. Att'y Genl., 46 N. J. Equity, 270; 19 Atl., 733.

The words of a statute imposing a tax like the estate tax, are not to be extended by implication for the purpose of imposing a tax which is not authorized by a reasonable interpretation of the language used. *Smietanka* vs. *First Trust & Savings Bank,* 42 Supreme Court Reporter, 223 (decided February 27, 1922). In this case the court construed the Revenue Act of October 3, 1913 (38 Stat., 114, Sec. II, paragraph D), which requires fiduciaries to make "a return of the net income of the person for whom they act." The question presented was, whether income held and accumulated by a trustee for the benefit of unborn and unascertained persons, was taxable. It was held that it was not taxable, the Court, by Chief Justice Taft, saying:

> "No language in the act included a tax on income received by a trustee by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing paragraph A the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source less allowed deductions. But nowhere were words used which can be stretched to in-

clude unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication. Treat vs. White, 181 U. S., 264, 267, 21 Sup. Ct., 611, 45 L. Ed., 853; United States vs. Field, 255 U. S., 257, 41 Sup. Ct., 256, 65 L. Ed.; Gould vs. Gould, 245 U. S., 151, 153, 38 Sup. Ct., 53, 62 L. Ed., 211."

Applying these familiar rules of construction to the statute quoted, it appears that the introductory words of said Section 202 and the three following clauses (a), (b), (c), really constitute a single sentence, with the two year rule of evidence thrown in parenthetically in Clause (b). The periods at the end of Clause (a) and after the words "moneys worth" in Clause (b) do not change this construction. The whole enactment from the beginning of Section 202 to the end of Clause (c) is a single expression of thought, with the rule of evidence as to transfers inserted as a parenthesis. At the end of this parenthetical expression is a semi-colon, which is immediately followed by the word "and," connecting Clauses (b) and (c) and thus completing the sentence. The Clause (b) is the complement of Clause (a) (*United States* vs. *Field,* 255 U. S., 257, at 264) and Clause (c) is the complement of Clauses (a) and (b) and completes the sentence.

Considering Clause (c) in its proper relation to the entire sentence, the first part of the clause means that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property" * * * "held jointly or as tenants in the entirety by the decedent and any other person to the extent of the interest of the decedent therein" (i. e., in the property so held jointly or as tenant by the entirety), and the latter part of the clause means that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property" (i. e., moneys, etc.) "deposited in banks, or other institutions in their joint names" (i. e., in the name of the decedent and any other person) "and payable to either or the survivor, except such part thereof" (i. e., of such money so deposited) "as may be shown to have originally belonged" (i. e., at the time it was deposited) "to such other person and never" (i. e., at the time of the original deposit or since) "to have belonged to the decedent * * *."

The words "except such part thereof as may be shown to have originally belonged to such other person," were not intended by Congress to refer at all to the property "held jointly or as tenants in the entirety by the decedent and any other person," which property "to the extent of the interest therein" held by the decedent at the time of his death, is to be taxed under the first portion of Clause (c).

It was of course well known to Congress that estates by the entirety and joint estates are created by will or by deed or some other instrument of transfer, vesting the estate by the entirety in hus-

band and wife, or vesting the joint estate in two or more persons. When either estate is created in any of the ways mentioned, title always comes to the tenants by the entirety or to the joint tenants from the same source and at the same time; therefore, if the word "originally" means *at the time of the creation of the joint estate*, as is claimed by the defendant-in-error, it is evident that property which came to the tenants by the entirety or to the joint tenants by grant, transfer, devise or bequest from another person could not at that very same time have "originally belonged" to either of the devisees, legatees, grantees or assignees which took the estate. If "originally" means, at any time *prior* to the creation of the joint estates, it is to be observed that the statute does not limit the inquiry to any period of time and it would seem that the question as to who was the "original owner" would have to be determined by an examination of the title to the property back to the time when either or any of the joint owners were first capable of holding property, viz., the date of the birth of the older or oldest of the joint owners. That the words "originally belonged" were not intended to refer to the decedent's interest in a joint estate in bonds and mortgages and corporate bonds, is also shown for the further reason that the words "such part thereof" in the exception mentioned aptly refer to the deposits in banks mentioned in the immediately preceding portion of the clause, and cannot, without strained construction, be made to refer to the "interest" of the decedent in a joint estate in securities. The interest of the decedent in a tenancy by the entirety or a joint estate in land or securities, is to be included "to the extent

of the interest" of the decedent at the time of his death, that is, to the full extent of such interest without reduction. The interest of the decedent in joint bank accounts is to be limited to the amount of the moneys deposited therein which "originally belonged" to the decedent. All the money in the joint bank account is to be counted in "except such part thereof as may be shown to have originally belonged to" the surviving co-depositor. This is the natural and easy construction of the language, whereas to say that "such part thereof" refers to such part of "the interest" of the decedent in jointly owned land or securities, imposes a strained and awkward construction of the words which otherwise comfortably fit into and fill up their place in the scheme of the statute. It is a matter of common knowledge that joint accounts are opened in banks or other institutions in the names of husband and wife (usually) or of parent and child, or other members of the family. In some instances, the money so deposited belongs at the time of the deposit to one of the persons whose name appears on the bank book; in other instances, the parties opening the account make deposits therein from time to time. It would be a matter of great difficulty for the Government to determine in every instance who actually owned and deposited the money which was found on the occasion of the death to stand in the joint names of the decedent and another person; therefore, Congress seems clearly to have intended by the latter portion of Clause (c) quoted to tax the whole of such joint bank accounts if no information is furnished by the surviving party in interest as to the real ownership of the fund, and

if satisfactory information is furnished, then to omit "such part thereof" (i. e., such part of the deposit) as the survivor can show to have "originally belonged" to him. As the statute refers only to joint accounts "payable to either or the survivor," in every instance which can arise under the statute the decedent and the co-depositor each had full power to withdraw the whole account at any time, and, therefore, the surviving depositor is required not only to show that the fund "originally belonged" to him, but also to prove that under the dealings had between him and the deceased depositor in relation to the account, the balance found at the time of death never belonged to the decedent either at the time of the deposit or at any time since the deposit was originally made. It is easy to see that if each of two joint depositors put $5,000 into an account and the survivor drew out his $5000, that the balance of the account would properly belong to the decedent, and in the given instance, if the decedent had during his lifetime withdrawn all that he had put into the account or more, the balance remaining in the account, having "originally belonged" to the survivor, would still belong to him on the death of the decedent and would be no part of the decedent's estate.

The first interpretation put upon the statute by the Treasury Department was in accordance with the views above expressed, that the interest in a tenancy by the entirety to be valued, was only the interest which was beneficially owned by the decedent at the time of his death, and apparently, for a period of over two years the Treasury Department did not attempt to collect an estate tax on both halves of an estate held in tenancy by the entirety.

On January 30, 1917, which was about four months after the Act took effect and about four months prior to the death of the decedent, Commissioner of Internal Revenue W. H. Osborn, in a mimeographed letter to Collectors of Internal Revenue, ruled that in a case where real estate had been conveyed to husband and wife as tenants by the entirety

> "one-half the total value, as of the date of the decedent's death, of the entire property held by decedent and decedent's husband or wife, as the case may be, as tenants in entirety, must be included upon the return of the decedent's estate as a part of the gross estate."

The Commissioner in this ruling further stated:

> "There can be no question of the intent of Congress to levy estate tax because of such an interest, the paragraph in question providing that all the property held thus in entirety by the decedent and another shall be subject to the tax 'except such part thereof as may be shown to have *originally belonged* to such other person and never to have belonged to the decedent.' Under the Pennsylvania law as stated by you, the Government would be justified in taxing the entire estate held thus jointly, if the language of Congress were to be interpreted in its most technical and narrow sense. *However, it seems clear that it was not the intent of Congress in such a case to tax the whole estate held in entirety, but only such a share thereof as could be fairly considered to have represented the*

equitable interests of the decedent tenant. It will be ruled, therefore, that in such a case as you cite one-half the total value, as of the day of the decedent's death, of the entire property held by the decedent and decedent's husband or wife, as the case may be, as tenants in entirety must be included upon the return of the decedent's estate as a part of the gross estate" (italics ours).

Corporation Trust Co.—War Tax Service, 1918, page 35.

This ruling of Commissioner Osborn was shortly afterward referred to in a ruling dated February 14, 1917, and approved by the Secretary of the Treasury, in which the Department stated as follows:

> If, under the Texas law, property conveyed to a husband or wife during their marriage is taken by each in entirety and in such a manner that it could not be contended that any specific part belonged to either, but that each was the owner of all, and upon the death of either no new interest or title vested in the survivor, as is the case in some states, the Government, under a strict and technical interpretation of Paragraph C of Section 202, would perhaps be justified in demanding that the whole of the property thus owned be included as a portion of the gross estate of the decedent. *This, however, does not seem to have been the intent of Congress and it has heretofore been ruled in a similar case that one-half of the property, thus jointly owned, should be returned as a portion*

of the gross estate of the decedent husband or wife as the case might be (italics ours).

Corporation Trust Co.—War Tax Service, 1918, page 40.

Subsequently these rulings were changed and the Treasury Department, in Official Regulations No. 37, issued under the Revenue Act of 1918, which was approved February 24th, 1919, held generally, with respect to joint estate, tenancies by the entirety and joint bank deposits that

> "the value of such property to be returned for tax is the value of the entire property unless it can be shown that part of it originally belonged to the other joint owner and never belonged to the decedent" (Art. 28 of said Regulations).

The Treasury Department, in changing its rulings, has evidently endeavored to adopt the construction of the statute which it deems most favorable to the Government and put the responsibility upon the courts (where it, of course, belongs) of authoritatively and finally construing the law. It is submitted, however, that the original rulings above quoted, made within a few months after the passage of the Act by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is a significant fact in arriving at the intention of Congress, especially as these rulings had, for the time being and until overruled by the Court, the force of law (Estate Tax Law, §212).

The construction above contended for gives reasonable effect to every part of the clause and is in

harmony with the spirit and purpose of the Act, which is to impose a tax upon the exercise by a decedent of his right to transmit property, on the reasonable and just basis of the value of the property which he shall transmit, by will or under the interstate laws, on the occasion of his death.

POINT II.

The Estate Tax Law of 1916 should be so construed as to give it a prospective operation only and as not applying to an estate or interest which was vested in a person other than the decedent more than four years before the passage of the Act.

"The first rule of construction of statutes is that legislation is addressed to the future and not to the past. This rule is one of obvious justice.

Unless its terms unequivocally import that it was the manifest intent of the legislature enacting it, a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated."

Union Pac. R. R. Co. vs. Laramie Stock Yards Co., 231 U. S., 190.

"Words in a statute ought not to have a retrospective application, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless

the intention of the Legislature cannot be otherwise satisfied."

United States vs. *Heth* (1806), 3 Cranch, 339, 413; 2 L. ed., 479, 483.

There is nothing in Clause (c) which makes a retrospective interpretation thereof *necessary*. The clause reads that the value of the joint property "to the extent of the interest therein held jointly," etc., is to be included. The word "held" as here used, means *held by the decedent at the time of his death*, as the tax itself is, by Section 201, "imposed upon the transfer of the net estate of every decedent dying after the passage of this Act." Said Section 202 also provides that the value of the estate is to be determined by including the value "at the time of his death" of the property described.

The word "originally" as used in Clause (c) is susceptible of several different meanings.

The learned District Court has held herein (page 25) that it refers *to the time of the passage of the Act*, September 8th, 1916, saying:

> "When viewed retroactively, it must be assumed that Congress would regard as the original owner of the 'part,' the surviving joint tenant who, prior to the passage of the Act, was vested or possessed of legal title, whether such ownership was the result of a gift or of a contribution of the 'part' of the property embraced within the joint tenancy."

The learned Circuit Court of Appeals has held that the word refers *"to the time the joint estate*

was created," either before or after the passage of the Act.

The learned Circuit Court of Appeals also states that—

> "The expression 'originally' refers *not to the time of death,"*

showing that this was another conceivable construction of the word as used, although no argument for such construction was advanced in that court by either side.

In *Pitser* vs. *McCreery*, 172 Ind., 663 (89 N. E., 317, 318, 319), a statute of Indiana provided that

> "All highways heretofore laid out according to law, or used as such for twenty years or more, shall continue as located and as of their original width, respectively, until changed according to law" (Burns' Annotated Ind. Stat., Rev. of 1914, Vol. 3, page 813).

The Court held that the word "original" as used, related to the time when the proceeding was begun to ascertain and record the width, saying:

> "If this clause can be said to refer to a case under the statute for ascertaining and recording highways, it could not change the result from the fact of a change of width within the twenty years, for the phrase 'their original width,' as we understand it is the width when the proceeding is begun to ascertain and record it and does not refer to a possibly wider or narrower way at some remote or recent period. * * * The statute

should have a reasonable construction to effectuate its intent."

The State Constitution of Washington (Article IV, §4), provided that a court should not have jurisdiction where the "original amount in controversy" was less than $200. The Court held that the meaning of the word "original," as used, was to limit the amount to the time when the matter first originates as a controversy in court.

Ingham vs. *William P. Hopper & Son,* 71 Wash., 286 (128 Pacific, 675, 676).

In the decision of questions arising under the clauses of the United States Constitution giving Congress power to regulate commerce (Article I, §8), and prohibiting the states from laying imposts or duties on imports (Article I, §10), the courts have held that the words "original package" refer to the package in the condition in which it exists at the time of shipment, and not to the smaller packages in which the articles were first contained on manufacture.

In re Harmon, 43 Fed. Rep., 372;
F. May & Co. vs. City of New Orleans, 178 U. S., 496.

In view of the several different meanings which can reasonably be applied to the word "originally," as used in statutes to effectuate their reasonable intent and purpose—it is respectfully submited that it is not imperative to construe said word as referring to any period of time prior to the date of the passage of the statute. The proper and

natural construction of the law is that it shall apply only to joint estates created *after* the passage of the Act, and that so construed, the word "originally" means, at the time when (after the passage of the Act) the joint estate was created.

By holding that the Estate Tax Law is to operate only in the future, the words "at any time" used in Clause (b), and the clause "except such part thereof as may be shown to have originally belonged to such other person, and never to have belonged to the decedent," employed in Clause (c), become easily explicable, and are readily allocated to a sense and purpose that are intelligible, and accord with sound principles (*Curley* vs. *Tait*, 276 Fed. Rep., 840). As regards the future, it is perfectly fit and proper for Congress to declare, if it deems that the public interest requires it, that any joint tenancy or estate created *inter vivos*, shall, at the death of either of the joint owners, be taxable as part of the estate of the decedent, to the full extent of the contribution made by decedent to the joint fund, "at any time" during his life and after the Act of Congress became a law. By holding the law applicable only to the future, all citizens are advised and forewarned of what will thenceforth be expected and exacted of them, and no one can complain that he was taxed for something he did at a time not only when there was no law imposing the tax, but when the actor had no way of knowing, or informing himself, that there ever would be any such tax imposed.

Thus reasonably construed prospectively as applying to estates created after the passage of the law, the Act is free from constitutional objection

on the ground that the right to devise or bequeath property by will or to pass it after death to another by means of the intestate laws, is not a natural right and the Congress or state legislature may impose a tax as a condition of the exercise of that right, which tax as to estates created and transferred *after* the Act becomes a law are subject to the conditions imposed even though they may be extremely onerous.

Matter of Dolbeer, 226 N. Y., 623.

In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are voided, it is the court's duty to adopt the latter interpretation.

U. S., ex rel. Attorney General vs. D. & H. Co., 213 U. S., 366.

In *Shwab* vs. *Doyle,* 269 Fed. Repr., 321, now pending undetermined in this Court, October Term 1921, No. 200, it appears that in 1915 the decedent by deed absolute in form conveyed his personal property to a trust company in trust for the payment of interest and principal to certain beneficiaries, with no reservation in favor of the grantor. The conveyance took immediate effect and was accompanied by delivery of the property. It was purely voluntary, without monetary consideration, and the decedent died a few days after the Revenue Act of September 8th, 1916, took effect. This transfer was within the two year period mentioned in Clause (b) of Section 202, and was, therefore, presumed to have been in contemplation of death. The Court held that the tax should apply to all transfers in contemplation of

death, whether made before or after the passage of the Act, provided the transferor's death occurred after the Act took effect. The Court said:

> "The evident theory of the statute is that transfers intended to take effect after the death of the grantor, as well as those made in contemplation of death, are equally testamentary in character."

If it should be held in this Court that the law applies at all to estates transferred in contemplation of death before the passage of the Act, it is submitted that the facts in the case at bar show that the assignments and transfers made in 1912, as stated in the complaint, were not made in contemplation of death. The date of the transfers is outside the two year period mentioned in Clause (b) and there is no presumption that the transfers were in contemplation of death. The case being here on demurrer, the facts alleged in the complaint must be taken in their aspects most favorable to the plaintiffs-in-error. No facts appear in the complaint to indicate that Mr. Kissam had any expectation or anticipation of death in either the immediate or reasonably near future. The mere fact that he transferred a portion of his property to Knox and that on different dates within the following period of a month Knox assigned and transferred the property to Mr. and Mrs. Kissam as joint owners, does not of itself show that said transfer was in contemplation of death. No facts appear in the complaint as to what other property was owned by Mr. Kissam in July, 1912, and it is nothing but conjecture to speculate as to whether the amount of property

transferred by him to Knox was, comparatively speaking, the major or minor portion of his estate at that time. If this be construed as a gift from Jonas to Cornelia, through Knox as an intermediary, disregarding the fact of his intermediate ownership, the facts alleged in the complaint show that (as to the wife's half interest in the property) it was not an outright gift inter vivos, accompanied by delivery of the securities and full and complete vesting of the estate.

In *Shwab* vs. *Doyle* (supra) the Court further stated:

> "It is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death, but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years prima facie provision."

In the instant case, the Government gains no advantage from the two year prima facie provision contained in Clause (b), and, because the complaint is barren of any facts which stamp the transaction as a gift in contemplation of death, the transfer to Cornelia, if it is a gift, must be considered as an out and out gift inter vivos, and

not in any sense in contemplation of death or to take effect in possession or enjoyment at or upon the death of the decedent.

As to the half interest which was owned and enjoyed by Jonas during his lifetime, there was a change in possession and enjoyment on the occasion of his death, and, therefore, the tax thereon was paid on the return without protest.

In *Curley* vs. *Tait,* 276 Fed. Repr., 840, District Court of the District of Maryland, November 29th, 1921, Rose, D. J., it appeared that the decedent Grafflin, who died in July, 1917, had transferred during the period of seven and one-half years before his death a considerable amount of property either to the Johns Hopkins Hospital or the Johns Hopkins University. The property was given outright by Grafflin, but the Hospital or University were required to pay income to Grafflin's wife during her life, and if Grafflin should survive her, then to pay income to him during his life. Grafflin predeceased his wife and so never became entitled to any income. The Government claimed that the transfers were made in contemplation of death. The executors paid the tax to the collector and sued to recover the amount.

The Court referred to Section 202, Clause (b) of the Act of 1916, as quoted above in full (page 9) and held that the words "at any time," as used in Clause (b), do not apply to transfers made prior to the enactment of the law, but are limited to a time subsequent to such enactment. The Court said:

> "These words, however, are susceptible of a reasonable construction, which would limit them to transactions taking place thereafter.

"Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so 'antecedent rights are affected or human conduct given a consequence it did not intend.' Union Pacific Railroad Co. vs. Snow, 231 U. S., 204-213, 34 Sup. Ct., 104, 58 L. Ed., 184.

"For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which, in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. Union Pacific R. Co. vs. Laramie Stock Yards Co., 231 U. S., 190, 34 Sup. Ct., 101, 58 L. Ed., 179. If this were a case of first impression, I personally would have no hesitation whatever in holding that the act of 1916 does not affect transfers made before it was passed."

The Court then discusses the case of Shwab vs. Doyle, 269 Fed. Rep., 321 (now pending undetermined before this Court, October Term 1921, No. 200), and refuses on grounds of "clearest conviction" on his part to follow its authority, saying:

"Apparently the Court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the Government's contention be sustained, the tax will come, not as in Wright vs. Blakeslee, supra, or in Cahen vs. Brewster, 203 U. S., 543, 27 Sup. Ct., 174, 51 L. Ed., 310, 8 Ann. Cas., 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.

"It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the Government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to sup-

pose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R Co. vs. Snow, supra."

The Tax Law of New York, Laws of 1909, Chapter 62, Section 220, subdivision 7, as it was amended by Laws of 1915, Chapter 664, and Laws of 1916, Chapter 323, provides as follows:

> "Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will."

The courts of New York have held that under the Transfer Tax Law of that State above quoted,

no more than the undivided half interest owned by the decedent can be valued in cases where the joint estates were created *before* the passage of the law.

Matter of McKelway, 221 N. Y., 15;
Matter of the Estate of Andrew Carnegie, 117 Misc., 806 (Nov., 1921).

The Court said, in Matter of McKelway, 221 N. Y., at page 19:

> "As to the one-half which Mrs. McKelway herself owned and had the right to dispose of, the rule of the PELL case must govern. She gained nothing in regard thereto by the death of her husband except as the *jus accrescendi* eliminated his interest. The right of the survivor of two joint tenants of personal property to the exclusive ownership thereof may be deemed a taxable transfer of one-half of the joint property but not to the whole."

The "Pell" case above referred to, is *Matter of Pell*, 171 N. Y., 48, where the Court held that a law passed in 1889 imposing a transfer tax upon remainders or reversions which vested prior to June 30, 1885, violated the New York State constitution and was void.

In *Matter of the Estate of Andrew Carnegie*, 117 Misc., 806 (Nov., 1921) it appeared that certain real estate was transferred to Mr. and Mrs. Carnegie as tenants by the entirety in the years 1898 and 1899, several years before the amendment of 1916 to the New York Transfer Tax Statute which is quoted on page 40 of this brief. The Surrogate of New York County held that, inasmuch as these estates were created before the pas-

sage of the Act of 1916, only one-half the value of the whole property held in the joint tenancy should be included as a basis for the tax, stating:

> "The executor contends that the surviving widow takes under the original conveyance by which the tenancy was created and that no transfer took place at the death of the decedent. The authorities in this state have greatly modified the attributes of the common law tenancy by the entirety. By reason of the enactment of the Married Woman's Property Acts by our legislature, the husband and wife are now tenants in common with equal rights in the rents and profits and with the right of survivorship. Matter of Goodrich vs. Village of Otego, 216 N. Y., 112, 117; Hiles vs. Fisher, supra; Grosser vs. City of Rochester, 148 N. Y., 235. The respective rights of the husband and wife in this form of title and the taxability of the transfer in the estate of the spouse first dying are clearly set forth by Mr. Justice Putnam in Matter of Moebus, 178 App. Div., 709. The facts there were exactly the same as those in Mr. Carnegie's estate, viz., creation of the tenancy before the passage of the act of 1916 and death after its enactment. * * * Whether the transfer to the survivor be regarded as the *jus accrescendi*, or the termination of the right of the deceased co-tenant to one-half the rents and profits, or the elimination of his interest in the entire fund, a succession of interest does take place at the death of the first co-tenant and the Legislature has, within its powers of taxation, expressly

declared that this transfer shall be assessed. Matter of Dolbeer, 226 N. Y., 623; Matter of Orvis, 223 id., 1, 7; Matter of White, 208 id., 64, 67."

Where the joint ownership was created *after* the enactment of the law, the courts of New York have held that the whole of the joint estate is subject to the tax. *Matter of Dolbeer*, 226 N. Y., 624, the Court in its opinion in this case stating:

"In Matter of McKelway (221 N. Y., 15), "it was held that even when the joint account "was created prior to the adoption of the "statute, the transfer by survivorship was tax- "able to the extent of one-half the joint prop- "erty. When the joint account is created sub- "sequent to the adoption of the statute, the "privilege of acquiring the entire property by "the right of succession may be subjected to "the tax on the method of acquisition. "(Matter of Vanderbilt, 172 N. Y., 69, 73; "Matter of Keeney, 194 N. Y., 281; 222 U. S.;, "525.) The right to take property by survi- "vorship is the creation of law upon which the "state may impose conditions (Matter of "Dows, 167 N. Y., 227; Matter of White, 208 "N. Y., 64, 67), if no vested or contract rights "are thereby violated."

The courts of New York, while still recognizing the incidents of joint tenancy, with right of survivorship under the terms of the instrument creating the estate, have held, for the purpose of assessing the New York transfer tax on the estate of

the deceased joint tenant, that the value of one-half of the jointure should be included not upon any technical decision as to the transfer of title, but upon the broader ground that upon the occasion of the death of the first joint tenant the joint estate did practically undergo such a change in the beneficial enjoyment of one-half thereof, namely that whereas before the death, each joint tenant had the right to one-half of the income and after the death the surviving joint tenant had the right to the whole income, that the law would regard such a change in the beneficial use of the property as a sufficient basis for the levying of a transfer tax as to such half interest with respect to which the change in beneficial enjoyment occurred. *Matter of McKelway* (supra).

The reasoning of the New York courts was adopted by Judge Mayer in his decision in the instant case in the District Court (pages 20 to 25). It has also been adopted and followed by analogy in the very recent case of *Congdon* vs. *Lynch,* U. S. District Court for the District of Minnesota, not yet reported. Counsel respectfully contends that the decisions in the *Matter of McKelway,* supra; *Curley* vs. *Tait,* supra; *Congdon* vs. *Lynch,* supra; and Judge Mayer's decision in the instant case (page 25) were all correct in excluding from consideration, estates vested in persons other than the decedent before the passage of the taxing statute. As Judge Mayer said:

> "When viewed retroactively it must be assumed that Congress would regard, as the original owner of the 'part,' the surviving joint

tenant who, prior to the passage of the Act, was vested with or possessed of legal title, whether such ownership was the result of a gift or of a contribution of the 'part' of the property embraced within the joint tenancy."

By doing this, as was stated by Judge Mayer in the District Court in this cause (page 25):

"* * * the statute will be workable from a "practical standpoint, and what may prove to "be serious objections will be avoided."

In the Congdon case the agreed facts were as follows: On April 25, 1913, a certificate of deposit was issued by the Northwestern National Bank of Minneapolis, in the sum of $50,000, payable to the order of Chester A. Congdon and Clara B. Congdon, or either of them, or both, or the survivor; and on the 30th day of April, 1914, a similar certificate, of a similar amount, was issued by the American Exchange National Bank of Duluth; at all times since the issuance of said certificates of deposit they were in the possession of Clara B. Congdon, and upon the death of Chester A. Congdon, said Clara B. Congdon, in her own right, and claiming to be the owner of the funds evidenced by said certificates, collected the amounts represented by them and no part of said funds was ever claimed or received by the plaintiffs as executors of the estate of Chester A. Congdon.

After quoting the Transfer Tax Act of the State of New York (already referred to in this brief) the opinion proceeded:

"Under this statute it has been held that the property so deposited was taxable to the extent

of one-half of its value on the theory that a joint owner of personal property may dispose of his own interest during his lifetime, and that the doctrine of survivorship applies only if the jointure is not thus severed, and that therefore the absolute ownership of the undivided one-half of the joint property which the deceased joint owner might have disposed of passed to the survivor upon his death, and not until then * * * and that the surviving joint tenant has at all times been the owner of an undivided one-half interest, subject to the right of his co-tenant to take by survivorship and that therefore that undivided interest was not taxable, but that the survivor succeeds to the absolute ownership of the other undivided one-half interest only by and upon the death of his co-tenant, and that therefore such interest is taxable. * * * In view of the similarity of the provisions of the New York statute and the Federal Estate Tax Act and in view of the foregoing construction of the New York statute given by its courts, I am of the opinion that one-half only of the funds represented by the certificates of deposit above mentioned should be included in the gross estate of Chester A. Congdon."

POINT III.

If Clause (c) of Section 202 of the Estate Tax Law be construed as requiring that both halves of a jointly owned estate in personal securities created more than four years before the passage of the law, be valued, on the death of one of the joint owners, as a part of his estate, said clause, so construed, is repugnant to the Constitution of the United States, because it is in operation and effect an ex post facto law, which attempts to authorize the taking of private property for public use, by an arbitrary exaction under the guise of a tax, without due process of law and without compensation, and transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems, and amounts, as applied in the case at bar, to a direct tax, upon property without apportionment.

If construed retroactively, the Estate Tax Law is unconstitutional, because,

(1) It takes private property without due process of law.

(2) It takes private property for a public use without compensation.

(3) It imposes a direct tax without apportionment as the Constitution prescribes.

Wherein, and in what way, will the Estate Tax Law, if construed retroactively, violate the Constitution in the several ways above enumerated?

(1 and 2) The law provides for the imposition of a tax in the nature of an excise, upon the right or privilege of transferring property at death. The law does not contemplate a tax on property, but merely, and only, a tax on the privilege of passing on, or transmitting to others, property at death. Consequently, before a tax can attach, or accrue, there must be a transfer at death, in some shape or form. It is only in that event, or in those circumstances, that a tax can become due, under said law. Now, where, as in the case at bar, the transfer is made, and the property passes and takes effect both as to right of property and as to the enjoyment thereof, four years before the passage of the Act and nearly five years before the death of the transferor, no transfer as to that property takes place at the death of the transferor and, therefore, no tax, under this law, accrues. Hence, if in spite of the fact that no transfer take place at the death of the transferor, the executive officers of the Government levy and collect a death, or transfer tax, they tax something that never existed; that never took place. Now, if that be true, if no transfer took place at death of decedent, and the Commissioner of Internal Revenue, notwithstanding that fact, proceeds to levy upon and collect from the estate of decedent a transfer tax measured by the value of property transferred by decedent during his life, and under which transfer the transferee became at once entitled to and possessed of the property so transferred, then manifestly, the amount of tax so

collected, is not a transfer or excise tax because, as to that particular property, there has been no transfer at decedent's death. That this is so, would be more obvious had Cornelia Kissam, during the life of her husband, transferred to a third party her interest in the joint property, as she had the right and power to do. Then what kind of a tax is it? There can be but one answer. If it cannot be a tax upon the right to transfer property at death, because there was no transfer of this particular property at decedent's death, then the tax must be upon property. But the Estate Tax Law does not provide for the imposition of a tax on property. If, therefore, while claiming to act under this law, the Commissioner of Internal Revenue levies and collects a tax upon property, he collects such tax without warrant of law, and that is taking private property without due process of law, and is taking private property for public purposes without compensation.

> Myles Salt Co. vs. Ibernia Dredging District, 239 U. S., 478, 485.

(3) What has just been stated to show that the Estate Tax Law, if construed retroactively, would take property without due process of law, and take private property for public uses without compensation shows, also, that the tax levied upon and collected from the estate of Jonas B. Kissam because of the transfer of property he made in 1912 through John C. Knox to Cornelia B. Kissam is a direct tax. We have already demonstrated that the increased tax collected by the Commissioner is not a transfer, death, or excise tax, because there was

no transfer of this particular property at decedent's death. Therefore, if it cannot be a tax on the right or privilege of transmitting the property in question at decedent's death, because no transfer thereof was made at his death, then the tax must be upon property. If it is a tax on property, then it is a direct tax and must be apportioned as the Constitution directs. If the law is held to be effective only as to transfers made after its passage, then the tax will attach to all transfers thereafter made, when and as the transfers are made, although the collection and payment of the tax may be deferred until the death of the transferor.

Keeney vs. New York, 222 U. S., 525, 537.

After thoroughly reviewing the various forms of death duties found in the laws of foreign countries and in the legislation of the United States and of the several states of the Union, Chief Justice White, in *Knowlton* vs. *Moore*, 178 U. S., 40, at page 56, said that:

> "* * * tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

And again (at page 57) he said:

> "Confusion of thought may arise unless it be always remembered that, fundamentally

considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

Applying these fundamental principles to the Estate Tax Law of 1916, it is evidently a valid enactment when applied to transactions which have occurred after the day it took effect as a statute.

It is only when the provisions of the Act are applied to transactions which were made and completed before the passage of the law, that the difficulties in executing the statute appear.

The learned Circuit Court has evidently considered the transactions alleged as constituting a gift *inter vivos* from Jonas to Cornelia as to the half interests held and enjoyed by Cornelia under the several assignments from Knox, and has decided that it does not offend any provision of the Constitution to measure the tax on the transmission by Jonas of his actual estate by will, in part by property which he gave away during his lifetime. On this point the Court said:

> "The Act takes effect upon the death; it does not become retroactive because it measures a transfer tax payable by an estate in part by property which the decedent has given away in his lifetime. This seems to us perfectly fair and an answer to the constitutional objection" (Transcript of Record, page 39).

Counsel respectfully contends that the Learned Circuit Court was in error in holding that a transfer tax payable by an estate can be measured in part by property which the decedent had given

away in his lifetime before the passage of the Act, on the ground that such a transaction is in effect a direct tax on property, or an arbitrary exaction under the guise of a tax, and is not an excise or transfer tax.

The learned Circuit Court of Appeals has sustained the Commissioner of Internal Revenue in holding that he was authorized under clause (c) of Section 202 to make the additional assessment complained of. That court has considered that the facts alleged in the complaint show that inasmuch as Jonas owned all the property on July 15, 1912, when he assigned and transferred it to Knox, it all "originally belonged" to him when the joint estates were created on July 19 and August 13, 1922 (disregarding this intermediate ownership by Knox) and that none of the property ever "originally belonged" to Cornelia and, therefore, on these facts and because of these facts of ownership in 1912, the whole value of all the property must be included as part of the estate of Jonas as a basis for levying the tax.

The learned court does not limit the period within which the gift might have been made to that portion of the donor's lifetime lived after the passage of the law. The transaction under consideration by the court occurred several years before the passage of the law under consideration. The language of the court must be construed as meaning to apply to property given away by the decedent at *any* time whatsoever before the passage of the law. There is no presumption in the case at bar that the transfers were made in contemplation of death or intended to take effect in possession or enjoyment at or after the death of the decedent, as the said

transfers were made more than four years prior to the passage of the Act and nearly five years prior to the death of the decedent. The facts alleged in the complaint must be read in the light most favorable to the plaintiffs-in-error and, so read, they show no basis for a finding that the transfers were in fact made in contemplation of death or, as to the Cornelia half interest under discussion, intended to take effect in possession or enjoyment at or after the death of the decedent. The complaint also alleges that the Commissioner of Internal Revenue and the Collector both assumed to act under the provisions of clause (c) of Section 202 (page 10) which allegation is admitted by the demurrer. Therefore we have a case where the assessment of the tax is sought to be justified on the ground that the statute intends to authorize the amount of the tax against the estate of the decedent to be measured in part by property which he gave away several years before the Act was passed, by a gift not in contemplation of death or to take effect in possession or enjoyment at or after the donor's death.

As the Sixteenth Amendment to the Constitution relates only to taxes on incomes, *Pollock* vs. *Farmers Loan & Tr. Co.,* 158 U. S., 601, remains authority for the proposition that taxes on personal property are direct taxes which, to be valid and collectible, must be apportioned among the several states, as required by the Constitution (Sections 2 and 9 of Art. I).

In *Eisner* vs. *Macomber,* 252 U. S., 189, the court held that the income tax provisions in the Act of September 8, 1916, so far as they attempted to tax as income of a stockholder, a stock dividend made lawfully and in good faith against profits accumu-

lated by the corporation since March 1, 1913, were in conflict with the Constitution and void, because they attempted to impose an unapportioned direct tax on personal property.

The real character of a tax is, of course, to be determined by the facts and conditions under which it is imposed, and not by its name. A tax may be said to be a "transfer tax" on the estate of J, but if it is based upon the value of the property of C, which has not been transferred since the statute took effect, and which must be paid by C, in any event, out of the property which she gets as beneficiary under the will of J, it is in practical effect a tax imposed because of facts and conditions of ownership previous to the enactment of the taxing statute, and, therefore, while called a "transfer tax," amounts to a direct tax upon property because of the ownership of property, regardless of the name the tax bears.

It is evident that after the delivery of the several assignments in July and August, 1912, Mr. Kissam had no longer any dominion or control whatever over the half interest transferred to Mrs. Kissam. It was her separate property and she had the exclusive right to enjoy the income from it and the absolute right to sell and dispose of it during her lifetime. She was still living at the time her husband died. The Estate Tax Law was not contemplated by anyone at the time the transfers were made in 1912. When the law was enacted over four years later, there was nothing which Jonas B. Kissam could do except at the sacrifice of other rights as hereinafter stated, to alter the situation imposed by the statute or relieve his estate from the burden of the transfer tax based in part on the value of

property which he had transferred four years previous. Whether he made a will or died intestate, the tax, if valid, would fasten upon his residuary estate instantly upon the occasion of his death. It was an "absolute and unavoidable demand." He could not escape it in any way whatsoever. He made a will, but this fact had no bearing on the liability of his estate to tax, as his estate would have been taxable in precisely the same way if he had died intestate.

If Mrs. Kissam had sold her half interest in the property during their joint lives, Jonas would have become a tenant in common with her assignee (*Matter of McKelway*, supra), and Jonas's half interest would have become a part of his actual estate, subject to the payment of his debts, etc. Jonas could also have sold his half interest during their joint lives and so severed the jointure, which would have left Cornelia the owner of her half and left him the owner of the proceeds of sale from his half. The fact is that neither sold. The defendant-in-error contended below that because Jonas did not sell and sever, his inaction amounts to an acquiescence in the provisions of the statute and clothes the transactions somewhat with the aspects of a testamentary disposition, and argued therefore that it is just and proper that the decedent's estate should be bound by the consequences of his inaction, the same as if he had created the joint tenancy after the passage of the law. In his brief below defendant-in-error argued that "decedent was under "no obligation to continue the joint tenancy and "subject his estate to this tax."

This contention overlooks the fact that Jonas after making the transfers of 1912, might have become incompetent by reason of insanity or some

other disability and so have been unable to sell or sever. Moreover, if he were competent at all times to act, he could not have sold and severed the jointure without thereby losing his right to take the Cornelia one-half by survivorship if he should outlive her and if she should not sell her interest during their joint lives. Surely a citizen cannot be put to the election of giving up a right to take property by survivorship, as the price of avoiding an arbitrary and otherwise unlawful imposition of a tax.

In *Chew Heong* vs. *United States*, 112 U. S., 559, it was stated as a rule of construction that

> "* * * the courts uniformly refuse to give to statutes a retrospective operation, *whereby rights previously vested are injuriously affected*, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature."

The transaction has manifestly "injuriously affected" the rights of Cornelia B. Kissam, in that she, as the sole beneficiary under her husband's will, has actually been compelled to pay, or stand the loss of, a large sum of money as a tax on the exercise by her husband of his right to transmit property by will, in a case where it clearly appears that the whole of the tax complained of is measured entirely by the value of property which was vested in her individually long before the passage of the law, and as to which there has been no actual succession or transfer or change in the beneficial enjoyment.

The one-half share in jointly owned property which Mrs. Kissam took *by survivorship* constituted no part of her husband's estate and was not subject to the payment of debts against his estate or the expenses of its administration, or subject to distribution as a part of his estate. If the item representing the value of this interest taken by survivorship were not included, the estate would not have been taxable under the Act. The executors, however, included the value of the half interests taken by survivorship and paid the tax based thereon at the time of filing their Return. They also included the value of these one-half interests taken by survivorship in the New York transfer tax proceeding and paid the New York transfer tax thereon.

If another citizen (say Smith), who had made no transfers of his property in former years, such as the 1912 transfers made by Mr. Kissam to Knox and by Knox to Mr. and Mrs. Kissam, as shown in this record, had died on the same day as Mr. Kissam, leaving exactly the same amount of property, the tax payable on his estate would of course, have been the same as that paid by the executors of Mr. Kissam on the filing of their Return.

The additional tax paid under protest (page 9), of which the sum of $11,819.74 is now sought to be recovered herein, represents the amount which the estate of Kissam has been required to pay over and above the amount which the executor of the estate of Smith would have been obliged to pay on the same actual net estate. The additional assessment upon the Kissam Estate over and above the assessment on the Smith Estate is made solely

on account of the fact that Mr. Kissam made the transfers in 1912 and Smith did not make any such transfers. Is it not, therefore, clear that such a tax, regardless of its name, which is imposed because of transfers of title made long since on the basis of the value at the time of the decedent's death of the property long previously transferred, resting upon the incident of ownership of property on a past date and the gift of the property *at that time,* is in truth and fact a direct tax on property because of its ownership? Such an attempt at direct taxation, under the Income Tax Law, of property which was held to be capital and not income, was declared unconstitutional in *Eisner* vs. *Macomber,* 252 U. S., 189.

In *Knowlton* vs. *Moore,* 178 U. S., 40, at page 76, Chief Justice White, in discussing the theory of construction that a legacy tax under the Act of June 30th, 1864, taxes each separate legacy by a rate determined not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, said:

> "The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dol-

lars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent., and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent., and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

"We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."

We have suggested in Point I that it was not the intention of Congress in Clause (c) of Section 202

of the Act of 1916, to apply the test of "original ownership" in arriving at the value of the interest of a decedent in an estate by the entirety or in a joint tenancy in land or a joint ownership in personal securities, pointing out that so far as the decedent had such an interest at the time of his death, it is always to be valued "to the extent of the interest," and that the test as to "original ownership" mentioned later in the clause, was intended to be applied in getting at the portion of moneys deposited in banks in the joint name of the decedent and some other person and payable to either or the survivor which was equitably a part of the decedent's estate.

If, however, the Treasury Department and the learned Circuit Court are correct in construing the "original ownership" test as applying to all joint tenancies and all joint ownerships whatsoever, then absurd, unjust and oppressive consequences necessarily result and grave constitutional questions arise when the law is applied in this way to rights and interests which were vested before the passage of the act.

It is well known that a joint tenancy in real estate, or a joint ownership in personal property, may be held by any number of persons. It was for many years in New York City a favorite method of holding title, adopted by intimates in groups of two or three or four persons actively operating in real estate as a business. Among the advantages of such holding was the fact that their extensive operations would not be halted by the death of any one of the number, and also the fact that in such form of holding it was not necessary to have the wives of the several joint owners join in the execution of deeds

(Gerard on Titles, 140), and the writer of this brief once drew an agreement under which nine men took title in joint ownership to a tract of land and built and sold a considerable number of houses.

Assuming the Court would construe the word "person," as used in Clause (c), to mean "persons" (if this be permissible to enlarge the application of a special taxing statute), the interest of every joint owner, whether he be one of two or of a larger number, would be taxable "to the extent of the interest" held by him in the joint property at the time of his death. In the case at bar, the joint ownership was held by only two persons. The executors returned the one-half interest owned by the decedent, and the Commissioner of Internal Revenue assessed an additional tax on the basis of the other half interest owned by the survivor.

Let us suppose that there were *three* joint owners, instead of two: Following the same method of assessment, the executors would return the one-third interest owned by the decedent, and the Commissioner of Internal Revenue would make an additional assessment based on the two-thirds interest owned by the two surviving joint owners; if there were *nine* joint owners, the executors would return the value of the one-ninth interest owned by the decedent, and the Commissioner of Internal Revenue would assess the eight-ninths owned by the survivors, and so on. The actual interest of the decedent in each one of the joint ownerships might be the same, say, for instance, $10,000, which would be a half ownership in a $20,000 estate, or a one-third share in a $30,000 estate, or a one-ninth share in a $90,000 estate; but the amount of the additional assessment which would be imposed by

the Commissioner of Internal Revenue would vary in every instance based upon the mere incident of the number of joint owners, and would not be based at all upon the value of the decedent's interest.

The defendant-in-error has said in the courts below that the tax is upon the actual estate of the decedent, although it is measured in part by the property of the survivor. If this be so, to require the executor of a decedent owning a half interest to return the value of the other half interest owned by the survivor, is the equivalent of valuing the half interest owned by the decedent at two hundred per cent. of its actual value. If the decedent owns a one-third interest and be required to return the value of the other two-thirds, it is equivalent to valuing his one-third interest at three hundred per cent. of its actual value; and if he should happen to be one of nine joint owners, and be required to return the value of the other eight-ninths, it is the equivalent of valuing his one-ninth interest at nine hundred per cent. of its actual value, the difference in this fictitious valuation resting solely upon the circumstance of the number of joint owners.

We submit that it could not have been the intention of Congress to inflict such unjust and oppressive taxation upon the people, even if it had the power to do so. It is not necessary in this case to impute any such intention to Congress, because none of these absurd or unjust or oppressive consequences follow if the Act be given the reasonable construction which we contend should be given to it, namely that, where real property or personal securities are held in joint ownership, the only portion thereof to be returned is the interest of the decedent therein, which is to be valued "to the extent of the interest."

If the Commissioner of Internal Revenue and the Circuit Court of Appeals are right in their construction of the law, we are forced to the consideration of the absurd consequences and the injustice and oppression mentioned above. While we are aware of the very extensive power of Congress in matters of taxation, we submit that a grave question must arise when it appears that an assessment is laid upon fictitious valuations varying in amount according to the mere incident of the number of joint owners, the Commissioner assessing in several given cases in each of which the actual interest of the decedent is the same, various arbitrary valuations ranging from two hundred per cent. to nine hundred per cent. of the same actual interest.

Does not such a proceeding violate in spirit and intent the Constitution? Is it not such a gross violation of the "due process" clause as to render the taxing statute in this respect invalid?

In *Knowlton* vs. *Moore* (1900), 178 U. S., 41, Chief Justice White said:

> "It may be doubted by some, aside from express constitutional restrictions whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

It is respectfully submitted that serious questions have been suggested which, if it were neces-

sary to decide them in this case, might result in the judgment of this Court declaring some clauses of the Estate Tax Law of 1916 to be unconstitutional. It is, however, not necessary for the Court in the instant case to decide those questions. As has been urged elsewhere in this brief, these questions can be avoided by giving the Act a prospective construction only, which, as was stated in *Union Pacific R. R. Co.* vs. *Laramie Stock Yards* (supra), is "the first rule of construction of statutes," and holding that the value of the one-half interest of Cornelia B. Kissam in the bonds and mortgages and corporate bonds described in the complaint and which was vested in her in 1912 and continued to be owned by her until and after the death of the decedent, Jonas B. Kissam, was not required to be returned as a basis for measuring the transfer tax on the estate of said decedent.

CONCLUSION.

For the reasons set forth above, it is submitted that the judgment of the United States Circuit Court of Appeals was erroneous and should be reversed.

STARK B. FERRISS,
Attorney for Plaintiffs-in-Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 602.

JOHN C. KNOX, as surviving Executor of the Last Will and Testament of Jonas B. Kissam, deceased, et al.,

Plaintiffs-in-Error,

vs.

RICHARD J. McELLIGOTT, as late Acting Collector of Internal Revenue for the Third District of New York,

Defendant-in-Error.

Appendix to Brief on Behalf of Plaintiffs-in-Error, Showing in Parallel Columns the Provisions of the Estate Tax Acts of 1916, 1918 and 1921.

STARK B. FERRISS,
Attorney for Plaintiffs-in-Error.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

ESTATE TAX LAW OF SEPTEMBER 8, 1916.

(39 U. S. Statutes at Large, 777, 778.)

Sec. 200. That when used in this title—

The term "person" includes partnership, corporations and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more han one district, then the collector of internal revenue at Baltimore, Maryland.

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One and one-half per centum of the amount of such net estate not in excess of $50,000;

Three per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Four and one-half per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Six per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000; * * * (as amended by Revenue Act of March 3, 1917, 39 U. S. Statutes at Large, page 1002, the corresponding percentages in the Act of September 8, 1916, being 1%, 2%, 3% and 4%).

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

ESTATE TAX LAW OF 1918.

(In effect Feb. 24, 1919.)
(40 U. S. Statutes at Large, pp. 1096, 1097, 1098.)
(New matter is in italics.)
Title IV.—Estate Tax.

Sec. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as *may be designated by the Commissioner.*

Sec. 401. That *(in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section* 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000; * * *

The taxes imposed by this title or by Title II of the Revenue Act of 1916 *(as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the army and navy and the extensions of fortifications, and for other purposes," approved March* 3, 1917) *or by Title IX of the Revenue Act of* 1917, *shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.*

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

ESTATE TAX LAW OF 1921.

(Chap. 136 in effect Nov. 23, 1921.)

(New Matter is in Italics.)

Title IV—Estate Tax.

Sec. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person *in actual constructive possession of any property of the decedent;*

The term "net estate" means the net estate as determined under the provisions of section 403*;*

The term "month" means calendar month; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

Sec. 401. That, in lieu of the tax imposed by *Title IV of the Revenue Act of* 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000. * * *

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the army and navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, *or by Title IV of the Revenue Act of* 1918, shall not apply to the transfer of the net estate of any decedent who has died or may die from injuries received or disease contracted *in line of duty while serving in the military or naval forces of the United States in the war against the German Government, or to the transfer of the net estate of any citizen of the United States* who has died or may die from injuries received or disease contracted *in line of duty while serving in the military or naval forces of any country while associated with the United States in the prosecution of such war, or prior to the entrance therein of the United States, and any tax collected upon such transfer shall be refunded to the estate of such decedent.*

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross

(b) *To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;*

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) *To the extent of any property passing under a general power of appointment exercised by the decedent* (1) *by will, or* (2) *by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and*

(f) *To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.*

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, *and such amounts reasonably required and actually expended for the* support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, *but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;*

(2) *An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been*

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never *to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;*

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Sec. 403 That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amount for funeral expenses, administration expenses, claims against the estate, unpaid mortgages *upon, or any indebtedness in respect to, property (except, in the case of a resident decedent, where such property is not situated in the United States)*, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) *An amount equal to the value of any property forming a part of the gross estate situated in the United States* of any person who died within five

estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and*

(4) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, *but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;*

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917.

No deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent, and the amount receivable as insurance upon the life of a nonresident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402 shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

years prior to the death of the decedent *where such property* can be identified as having *been received by the decedent from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received: Provided, That this deduction shall be allowed only where an estate tax under this or any prior Act of Congress was paid by or on behalf of the estate of such prior decedent, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of such property* is included in the decedent's gross estate *and not deducted under paragraphs* (1) *or* (3) *of subdivision* (a) *of this section. This deduction shall be made in case of the estates of all decedents who have died since September* 8, 1916;

(3) The amount of all bequests, legacies, devises, *or transfers, except bona fide sales for a fair consideration in money or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death,* to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value, *of any property forming a part of the gross estate situated in the United States* of any person who died within five years prior to the death of the decedent, *where such property* can be identified as having been *received* by the decedent *from such prior decedent by gift, bequest, devise, or inheritance,* or which can be identified as having been acquired in exchange for property so received: *Provided, That this deduction shall be allowed only where an estate tax under this or any prior Act of Congress was paid by or on behalf of the estate of such prior decedent, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of* such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States, *and not deducted under paragraphs* (1) *or* (3) *of subdivision* (*b*) *of this section. This deduction shall be made in case of the estates of all decedents who have died since September* 8, 1916; *and*

(3) The amount of all bequests, legacies, devises, *or transfers, except bona fide sales for a fair consideration, in money, or money's worth, in contemplation of or intended to take effect in possession or enjoyment at or after the decedent's death,* to or for the use of the United States, any State, Territory, any political

In the case of any estate in respect to which the tax under existing law has been paidl, if necessary to allow the benefit of the deduction under paragraph (3) *of subdivision* (a) *or* (*b*) *the tax shall be redetermined and any excess of tax paid shalll be refunded to the executor.*

subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917.

No *deduction* shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

The amount receivable as insurance upon the life of a nonresident decedent *and any moneys deposited with any person carrying on the banking business, by or for a nonresident decedent who was not engaged in business in the United States at the time of his death, shall not, for the purpose of his title, be deemed property within the United States.*

Missionaries duly commissioned and serving under boards of foreign missions of the various religious denominations in the United States, dying while in the foreign missionary service of such boards, shall not, by reason merely of their intention to permanently remain in such foreign service, be deemed nonresidents of the United States, but shall be presumed to be residents of the State, the District of Columbia, or the Territories of Alaska or Hawaii wherein they respectively resided at the time of their commission and their departure for such foreign service.

In the case of any estate in respect to which the tax has been paid, if necessary to allow the benefit of the deduction under *paragraphs* (2) *and* (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

CONTENTS.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN C. KNOX, AS SURVIVING EXECUTOR of the Last Will and Testament of Jonas B. Kissam, Deceased, et al., plaintiffs in error,

v.

RICHARD J. MCELLIGOTT, AS LATE ACTING Collector of Internal Revenue for the Third District of New York, defendant in error.

No. 602.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action is brought to recover the amount of an additional estate tax assessed against the executors of one Jonas B. Kissam, deceased, and paid under protest to the defendant in error, the acting collector of internal revenue for the third district of New York. The tax was assessed under sections 200–212 of the act of September 8, 1916 (39 Stat. Ch. 463, pp. 777–780), as amended, known as the revenue act of 1916. The facts upon which the question here involved arises are simple:

In 1912 the decedent, Jonas B. Kissam, was the owner of certain bonds and mortgages and corporate

bonds. In July, 1912, he conveyed these bonds and mortgages and corporate bonds to the plaintiff in error, John C. Knox, who shortly thereafter reconveyed the same to the decedent and his wife, Cornelia B. Kissam, as joint tenants. The jointure thus created was never severed by either of the joint tenants. In 1917 Jonas B. Kissam died, leaving his widow, Cornelia B. Kissam, him surviving. Mrs. Kissam was made one of the executors of his will, as well as sole beneficiary thereunder. In making a return for estate tax, as required by the revenue act of 1916, as amended, which had been enacted subsequent to the creation of the joint estate, but prior to the death, the executors included in the gross estate of the decedent the value of only one-half the bonds and mortgages and corporate bonds placed in joint tenancy in 1912. Upon audit of the return, the Commissioner of Internal Revenue, pursuant to the provisions of subdivision (c) of section 202 of said revenue act of 1916, increased the gross estate by including therein the full value at the time of the death of said bonds and mortgages and corporate bonds, and assessed an additional tax based upon such increase. The additional tax so assessed was paid by the executors under protest to the defendant in error. A claim for refund was filed with the Commissioner of Internal Revenue, and rejected by him.

In the district court the plaintiffs in error recovered a judgment upon a demurrer to the first cause

of action setting forth these facts. The defendant in error sued out a writ of error to the Circuit Court of Appeals for the Second Circuit. The circuit court of appeals reversed the judgment of the district court, holding that subdivision (c) of section 202 of the revenue act of 1916 applied to joint estates created prior to the passage of the act, and that as so construed was constitutional. The case has been brought to this court by writ of error from this judgment of reversal.

THE STATUTES INVOLVED.

The pertinent sections of the act of September 8, 1916, as amended, under which the tax in question was imposed, are as follows:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *.
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth, * * *.

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent, * * *.

ARGUMENT.

In the brief for the plaintiffs in error it is contended that the statute properly construed does not authorize the imposition of the tax in question, and that if it does the statute is unconstitutional. In support of the proposition that the statute does not authorize the imposition of the tax it is urged—

1. That Congress did not intend to include in the gross estate of a decedent the full value of jointly held property, but only the value of the beneficial interest which the decedent held therein at the time of his death.

2. That if the statute be construed to require the inclusion of the full value of such jointly held property, it was intended to apply only to joint estates

created subsequent to the passage of the revenue act of 1916, and not to joint estates created prior thereto.

It will be seen at a glance the close connection existing between this case and the companion cases of *Shwab* v. *Doyle* (No. 200) and *Union Trust Co.* v. *Wardell* (No. 236). These cases arise under subdivision (b) of section 202 of the revenue act of 1916 and relate to trusts created, or transfers made, prior to the passage of the act, in contemplation of death or intended to take effect in possession or enjoyment at or after death. In both of these cases the contention is made that the statute should not be held to apply to such trusts or transfers, and that, if so applied, the statute is unconstitutional.

I.

The statute plainly provides that property owned under the terms and conditions under which the decedent and his wife owned the bonds and mortgages and corporate bonds here in question shall be included to its full value in the gross estate.

The tax imposed by section 201 of the revenue act of 1916 is a tax on the right to transmit property from the dead to the living. It is an estate tax strictly so called. (*New York Trust Co.* v. *Eisner*, 256 U. S. 345; *Greiner* v. *Llewellyn*, U. S. Supreme Court, October term, 1921, No. 187, decided April 10, 1922.)

The tax is to be measured by the value of the net estate, determined by deducting from the value of the gross estate, computed as prescribed in section

202, the deductions provided for in section 203. The value of the gross estate is to be determined by including therein the value at the time of decedent's death of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of charges and administration expenses and to distribution as part of his estate; to the extent of the interest therein of which the decedent has at any time made a transfer or with respect to which he has created a trust in contemplation of death or intended to take effect in possession or enjoyment at or after his death, except in the case of a bona fide sale for value; to the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to decedent.

1. The scheme of taxation contemplated by the estate tax provisions of the revenue act of 1916 is that there shall be included in the measure of the tax not only the value of property passing strictly as part of the decedent's estate but also the value of all property of which the decedent has made a disposition on his death by means of a transfer effected or an estate created during his life.

Reduced to its lowest terms, section 202 means that in fixing the value of the gross estate, and hence of the net estate, for the purpose of measuring the tax, Congress did not confine itself to the value of property which actually passed as part of the estate

in the ordinary meaning of the term. Section 202 covers three different kinds of property:

(a) Property passing as part of the estate.

(b) Property transferred in contemplation of death or to take effect in possession or enjoyment at death.

(c) Jointly held property.

Neither of the last two kinds of property passes as part of the estate, but the value thereof is included in the value of the gross estate for the purpose of measuring the tax, since as to such property an actual disposition on death is effected.

Section 202 therefore exhibits a consistent plan of taxation by including in the gross estate not only the value of such property as the decedent disposes of by will or under the intestate laws, but also the value of property which he disposes of on his death by a transfer made during his life. Clearly transfers in contemplation of death and trusts intended to take effect in possession or enjoyment at or after death differ from outright gifts in that the complete disposition of the property takes place only upon the death. The same is true of a joint estate created by the decedent in his life out of his own property for the benefit of himself and some other person. The only reason for voluntarily placing property in joint tenancy instead of in tenancy in common is to have the benefit of the right of survivorship and thereby effect a disposition on death without the interposition of a will or the intestate laws. Congress has seen fit to classify such dispositions made during life with dispositions by will and under the intestate laws and

to provide that for the purposes of the tax, transfers of the former kind shall be treated in the same manner as transfers of the latter kind.

That this was the intention of Congress appears clearly from the provisions of the revenue act of 1918. In addition to the value of property transferred in contemplation of death or put in a trust to take effect on death and of joint estates, section 402 of the revenue act of 1918 has included in the gross estate the value of property passing under a general power of appointment exercised by decedent by will or by deed—when made in anticipation of death or to take effect after death (subdivision e)—and of all insurance policies payable to the executor, and of policies in excess of $40,000 payable to other beneficiaries (subdivision f). It seems needless to point out that none of the property covered by these last two subdivisions of section 402 of the revenue act of 1918 passes as part of the estate, but that the disposition thereof is essentially testamentary in character.

Plaintiffs in error contend that by subdivision (c) of section 202 of the revenue act of 1916 it was intended to include, as to joint tenancies, only the value of the interest of the decedent therein and not the full value of the jointly held property. In so far as the purpose of Congress is involved, this construction is inconsistent therewith. Had the purpose of Congress been only to reach the property in which the decedent might be said to have an interest at the time of his death it would not have included prior transfers in contemplation of death or trusts created to take effect at or after death. The purpose

disclosed by section 202 of the revenue act of 1916, and its successor, section 402 of the revenue act of 1918, is to fix the liability for estate tax, not only upon property passing as part of the estate, but also upon property disposed of at death by a transfer during life to the extent of the interest so disposed of.

In this respect Congress has followed the well-established policy of the British estate-tax statutes. The finance act of 1894 subjects to tax—

> (c) Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the customs and inland revenue act, 1881, as amended by section eleven of the customs and inland revenue act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom; and
>
> (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

The act of 1881, as amended by section 11 of the customs and inland revenue act in 1889, referred to in section (c) above, is as follows:

> The real and personal or movable property to be included in an account shall be property of the following description, viz:
>
> * * * * *
>
> (b) Any property which a person dying after such day having been absolutely entitled

> thereto, has caused or may cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, including any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person.

This act, at the time the Federal estate tax act was passed, had been construed to impose a tax on the full value of any property owned by decedent as to which he created or permitted to be created a joint tenancy less any amount contributed or paid for by the surviving tenant.

> Where an annuity is bought by A for the lives of himself and B, and the life of the survivor, and A is the survivor, no claim for duty arises on B's death. But where A and B contribute to the purchase in equal or unequal proportions, estate duty becomes payable on the death of the first one who dies, in respect of such proportion of the annuity as is equivalent to the proportion of the contribution made by the deceased to the whole purchase money. And generally where joint purchases have been made out of money contributed by two or more persons, the interest taxable will be the beneficial interest in such portion of the property as passes by the death, and has not been fully paid for by the survivor.

(Hanson, Death Duties, 6th edition, page 107.)

In *Attorney General* v. *Ellis*, (1895, 2 Q. B. 466) the court says, at page 470:

> We think that this is not only the true construction, but it is that best calculated to carry out the object of the act, which was to fix with liability to duty "all dispositions" which, while preserving to a man the enjoyment of personal property to the day of his death, make the same property pass on his death to some one else, and so become substitutes for wills. (Citing *Attorney General* v. *Gosling* (1892), 1 Q. B. 545, page 550.)

At the time of the passage of the revenue act of 1916 the States had begun to treat as taxable transfers the passing of property placed in joint tenancy to the surviving tenant by the right of survivorship. Thus section 220 of the New York State tax law (Consolidated Laws, ch. 60) was amended by chapter 664 of the laws of 1915 by the addition thereto of subdivision 7, which reads as follows:

> Whenever intangible property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a trans-

> fer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.

In *Matter of Dolbeer* (226 N. Y. 623) it was held that, when the joint tenancy was created after the passage of the amendment and there was nothing to indicate that the succession was not donative in character, the full value of the joint estate was subject to the tax.

By amendment in 1916 the statute was extended to cover other kinds of jointly held property besides intangible property and bank accounts; but since no exception is found in the statute as to the amount contributed by the surviving tenant, the full tax has been imposed, even when the whole property was contributed by the surviving tenant and none of it came from the deceased tenant. (*Matter of Bigelow*, 108 Misc. 601; *Matter of Chase*, 112 Misc. 684.)

The same purpose was exhibited by the California Legislature when in 1915 it passed the following amendment to the State inheritance tax act:

Act 4035 b, paragraph 1:

> (g) When any person or persons, either directly or indirectly, create any joint tenancy, joint account, joint deposit, or other in-

terest in any property, whereby any right of survivorship is created between such person or persons and any other person or persons, without valuable and adequate consideration therefor, the creation of such joint tenancy, joint account, joint deposit, or other interest in such property, with right of survivorship, shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the person or persons in this paragraph first mentioned, within the meaning of this act. (Amendment approved May 10, 1915, Stats. 1915, page 435.)

That this amendment intended to include the full value of the property contributed by the deceased tenant to the joint tenancy is shown by the sections relating to transfers in contemplation of death.

Paragraph 2. Property taxable: A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions, or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county as hereinafter directed, for the use of the State, in the following cases: * * *.

(3) Contemplation of death: Transfer to take effect after death. When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this State, by deed, grant, bargain, sale, assignment, or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor, or

donor, or intended to take effect in possession or enjoyment at or after such death. When such person, institution, or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of the act.

In 1917 the whole inheritance tax act was amended (act 4035c, approved May 23, 1917, chap. 589, Stat. 1917) and the provision in regard to joint tenancies was made to read as follows:

Paragraph 2. (5) Property held in joint names: Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint tenants, person or persons to immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been devised or bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such part thereof as may be proved by the surviving joint tenant or joint tenants to have originally belonged to him or them and never to have belonged to the decedent.

This is substantially the New York statute with the exception contained in the Federal law inserted in order to avoid the injustice worked by the New York statute in the cases cited above.

The right of survivorship is the distinguishing feature of a joint tenancy. Tiedeman, on Real Property, paragraph 117, states:

> The chief incident of joint tenancies and that which distinguishes them from tenancies in common, is the right of survivorship.

By placing property in joint tenancy a person may by virtue of the right of survivorship effect a disposition after his death without the necessity of a will or the operation of the intestate laws. In fact, the only reason for resorting to this rather archaic form of ownership, instead of to a tenancy in common, is to have the benefit of the right of survivorship.

It had been held under the State transfer tax laws that jointly held property passing by right of survivorship was not subject to tax since it did not pass as part of the decedent's estate.

Matter of Thompson (167 App. Div. 356).
Matter of Dalsimer (167 App. Div. 365).

The statutes cited above represent efforts upon the part of the respective State legislatures to correct this situation. The obvious inequality in taxing a disposition of property by will or the intestate laws and of leaving untaxed a similar disposition brought about by a transaction *inter vivos* led Congress to

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measure the tax imposed on the transfer of an estate upon death by the value of all property actually disposed of by a decedent on his death irrespective of the mode of disposition. For this reason the value of all property owned by the decedent and actually disposed of by him by being placed in joint tenancy was included in the measure of the tax whereas the value of the property contributed by the surviving tenant was expressly excluded, since, as to that property decedent made no disposition whatsoever. To construe the statute to apply only to one-half value of the jointly owned property, would be to defeat this purpose.

The essential fairness of this purpose is disclosed by a consideration of the fact that under the provisions of this statute, had Mrs. Kissam died before her husband, no tax whatever would have been imposed in respect to the jointly owned property, since as to that property no disposition would have been effected and it would all have come within the exception. Mr. Kissam would have received back the property which he contributed to the joint tenancy, and no tax would have been due upon the transfer of the same until his death. Since Mrs. Kissam, by contributing nothing to the joint tenancy, would have disposed of nothing, her estate would not have been taxed.

2. The interest to be included in the gross estate is not the interest of the decedent in the jointly held property, but the interest held jointly by the decedent and any other person, except such part of such interest as was contributed by the surviving tenant.

If the purpose of the act as set forth above is kept clearly in mind, it will be seen that Congress has used apt words to carry out this purpose. Omitting all portions irrelevant to the case at bar, section 202 reads as follows:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest therein held jointly * * * by the decedent and any other person * * * except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

The "interest" to be included is not the "interest" of the decedent in jointly held property, but the "interest held jointly by the decedent *and* any other person." The words "held jointly by the decedent and any other person" refer to "interest," not to "property," and no other construction is possible without doing violence to the words of the statute. Without assigning any ground therefor, on page 22 of their brief, plaintiffs in error baldly state that the first part of this clause means that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * held jointly * * * by the

decedent and any other person to the extent of the interest of the decedent therein." This is not the way the statute reads, and no reason is apparent for not following the natural reading. The words "to the extent of the interest therein" appear at the beginning of subdivisions (a), (b), and (c). In the first two subdivisions they plainly mean "to the extent of the interest in all property," since the word "therein" can only refer to these words. The same is true of subdivision (c), and uniformity requires that they should receive the same construction there. Instead of following in this obvious meaning, plaintiffs in error proceed to transpose them so as to make the words "held jointly by decedent and any other person" modify the words "all property" instead of "interest," and then to insert the words "of the decedent" after the word "interest." This is not construing but rewriting the statute.

The attempt to limit the value to be included in the gross estate to the interest of the decedent does not tend to clarify the statute but rather to confuse it. What is the interest of the decedent in jointly held property? At common law it is unquestionably in the whole property subject only to the rights of the other joint tenants. This would mean that the full value must be included in the joint estate. It is suggested that under the law of New York it is the interest of which the decedent has the right of disposition—in this case, one-half. This is at best doubtful, and when we come to tenancies by the entireties, in which there is no right of disposition,

even this argument can not be advanced. To adopt this reading would make this subdivision an obscure and illogical interpolation, whereas, if the plain meaning of the words is adhered to, it is perfectly clear and consistent with the general scheme.

Even if under the law of New York, the decedent is the owner of a half interest only in the property, in so far as the intention of Congress is involved, this construction is precluded by the language of the section. The last clause in the section conclusively supports the construction herein contended for by clearly indicating the intention of Congress to exclude from the operation of the tax that part of the jointly held property which originally, that is, before the creation of the tenancy, was owned by the survivor and contributed by him to the tenancy. To construe the statute to tax only one-half of the property and to except therefrom any part which may be shown to have originally belonged to the survivor, and never to have belonged to the decedent, that is such part of that half as had been given to the decedent, would be unreasonable and absurd. To hold that Congress intended to treat the decedent as the owner of his proportionate share of the jointly held property and yet to except from the value of that share the value of property which originally belonged to his cotenant or cotenants, would be to impute to Congress an intention which has no basis either in reason or in common sense. Why, if Congress intended to treat the decedent as the owner of one-half only of the jointly owned property and

to tax only that half, it should have excepted such part of his share as had originally been given to him by another, can not possibly be imagined, nor why this exception should have been made in the case of jointly owned property and not in the case of property held in common or given outright. It is submitted that the respect due to the legislative branch of the Government precludes the imputation to it of an intention so capricious and so devoid of a basis in reason.

The meaning of the section becomes clear, and unmistakable by realization of the controlling fact, that decedent, through the right of survivorship, disposes at his death of property owned by him. All the property which he originally owned, and so disposed of is to be included in the tax. But that which the survivor originally owned is not included for the reason that decedent as to such part is not making any disposition whatever.

Realizing the force of the contention that the last clause of the subdivision (c) clearly shows that the interest of to be included in the gross estate is not the alleged interest of the decedent in the jointly held property, but the value of the total joint interest contributed by the decedent, plaintiffs in error insist that this clause is to be limited to joint deposits and not to all jointly held property. The words "to have originally belonged to such other person and never to have belonged to the decedent'' clearly imply an ability to trace title to property, and are not applicable to money, the title to which can never be

traced. By reference to the acts which Congress had before it when it enacted this statute it is perfectly clear that the clause of exception is not confined to joint deposits but to all jointly held property. That is the grammatical and natural meaning of the language used, and had Congress intended otherwise it would have been very easy for it to have said so.

It is undoubtedly true that when a statute is obscure the court has power to transpose words to make it intelligible. The subdivision in question, however, is not obscure but plain on its face. Read in its natural meaning, it is consistent with the other parts of the statute and fits into a comprehensive and logical scheme of taxation. Read in the way for which plaintiffs in error contend, it is illogical, inconsistent with other parts of the statute, and obscure. In order to read it in this way not only is it necessary to take words out of the context and place them in parts to which they do not belong but an extensive interpolation is required. It is believed to be beyond the province of construction to make the changes suggested by plaintiffs in error in any event. Certainly this should not be done when there is no apparent reason for so doing, and the result is only inconsistency and obscurity.

The fact that the Commissioner of Internal Revenue in his early rulings ruled that in certain cases only the value of the share which could be said to belong to the decedent should be included in the gross estate is not entitled to much weight. In both of the rulings quoted by the plaintiffs in error it is dis-

tinctly stated that by the strict wording of the statute the full value of the jointly held property should be included. A modification of the wording of a statute is beyond the power of the commissioner and the rulings were very properly revoked by him.

8. The argument that the statute should be construed to apply only to joint estates created subsequent to its enactment is inconsistent with the wording thereof.

Plaintiffs in error argue that the statute was not intended by Congress to apply to joint estates created prior to its enactment. This contention was sustained in the district court, but was overruled by the circuit court of appeals.

If the wording of the statute be examined no support can be found for the contention that the statute should be construed to apply only to joint tenancies created after its enactment. It is conceded that the words "held jointly * * * by decedent and any other person" refer to the time of the death, mentioned in the first paragraph of section 202. But if this be so then there is no escape from the conclusion that the tax is measured by the value of all property so held at the time of death, irrespective of when the joint estate was created. Construing these words strictly against the Government can not lead to any other result. It would require the interpolation of a proviso excepting such joint estates as may have been created prior to the passage of the act to take such estates out of the statute. Plaintiffs in error contend that there is nothing in the subsection which refers to any period of time. But it is

the plaintiffs in error and not the defendant in error who wish to make it refer to a particular time. Defendant in error is willing to stand upon the proposition that all that is necessary is that there should be property held jointly at the time of death. If this be the case, then under the strictest possible construction the tax is imposed, and if plaintiffs in error wish to be excepted therefrom, they must point to language which clearly and unmistakably exhibits an intention to make such an exception.

Subsection (c) consists of two parts, the first setting forth what shall be included in the gross estate and the second making certain exceptions. Not one word can be pointed to in the first part which exhibits any intention whatsoever on the part of Congress to exclude joint tenancies created prior to September 8, 1916, and the word mainly relied upon is the word "originally," contained in the second or excepting part. It is wholly unauthorized to take the word "originally," which on its face means "prior to the creation of the joint tenancy" (as plaintiffs in error apparently admit on page 25 of their brief if this clause be construed to apply only to joint deposits), and distort it into meaning "at the time of the passage of the act," for by using the word "never" in the succeeding clause, Congress has shown the unmistakable intention not to confine the question to the time which has elapsed since the passage of the act, but to all the time during which the decedent was capable of owning property.

Reference is made to the argument in the companion cases involving the construction of subdivision (b) of section 202. If subdivision (b) must be construed to apply to transfers made prior to the passage of the act, then so must subdivision (c). It must be presumed that Congress intended a logical and consistent scheme of taxation, and if transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death, made prior to the enactment of the statute are to be included in the gross estate, so also must joint estates created prior to such enactment. So far as can be ascertained, only two courts have intimated that section 202 should not be construed retrospectively. Both decisions were by district courts—the first by Judge Mayer in the case at bar, and the second by Judge Rose in the case of *Curley* v. *Tait* (276 Fed. 840). The case of *Congdon* v. *Lynch*, not yet reported, decided by the District Court of Minnesota (cited in the brief for the plaintiff in error) does not so decide. Although holding that, of a joint estate created prior to the enactment of the revenue act of 1916, only one-half the value should be included in the gross estate, the court, referring to the question whether the estate tax law is retroactive in its operation, said that this question had "been answered, *and in my judgment correctly*, although adversely to the contention of the plaintiffs in the present suit by the Circuit Court of Appeals of the Sixth Circuit, in the case of *Shwab* v. *Doyle* (269 Fed. 321); the question has been answered in the same way in

Union Trust Co. v. *Wardell* (273 Fed. 33,) contra, *Curley* v. *Tait* (276 Fed. 840). See also as bearing upon this question, *Chanler* v. *Kelsey* (205 U. S. 466), *Wright* v. *Blakeslee* (101 U. S. 174), *Nickel* v. *State* (177 Pac. 409)." This case is therefore an authority in favor of the retrospective operation of this subdivision, since it contains a distinct approval of the principle of *Shwab* v. *Doyle* (No. 200), which principle is equally applicable to the case at bar.

4. The principle underlying the decisions in the New York State courts, that when a joint estate is created prior to the passage of the act only the value of the decedent's share therein is subject to a transfer tax, does not apply to the Federal estate tax.

The district court in the case at bar and the district court in the case of *Congdon* v. *Lynch*, in deciding that only one-half of the joint estate could be included in the gross estate were both influenced by the decisions of the New York State courts construing section 220 of the tax law of that State. (See *Matter of McKelway*, 221 N. Y. 15.) That these decisions are wholly inapplicable to the Federal estate tax, a brief consideration will show.

The New York State transfer tax is imposed not upon the right of the decedent to transmit property upon his death but upon the right of the beneficiary to receive property from the dead.

New York Trust Co. v. *Eisner* (256 U. S. 345):

A tax of this nature and the tax imposed by the Federal estate tax law must always be kept distinct.

> * * * the key to the construction of the finance act, 1894, and the amending acts, lies

> in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to the principles of succession duty which have no real connection with the subject. (Hanson, Death Duties, 6th edition, pages 1, 2.)

If this distinction is kept clearly in mind, it appears that the New York cases were decided upon principles which are entirely inapplicable to the present statute. The New York court held that on the death of one of two joint tenants, the other succeeds to his interest in the property, which amounts to the beneficial use of one-half thereof; that as to that half a transfer tax may be levied; but that to impose a tax on the remaining half in which, at the time of the enactment of the taxing statute, the survivor has a vested interest and as to which he receives no new rights by reason of the death, is to impose a transfer tax on a vested right. That such a tax can not lawfully be imposed under the New York State Constitution was held in *Matter of Pell* (171 N. Y. 48), which raised the question whether a transfer tax might be levied on a remainder which had vested prior to the passage of the transfer tax act, but which

did not come into possession until after it was passed. The reasoning of the court was that since the remainderman had acquired the absolute right to the enjoyment of the estate prior to the passing of the act, to deprive her of this right or to compel her to pay a tax upon the same, was a deprivation of her property without due process of law. How remote this is from the Federal estate tax, which is imposed upon the estate of a decedent as an excise tax for the privilege of transferring property on death, is readily seen. The principles which governed the New York court are entirely inapplicable. In the New York case the tax was imposed on the surviving tenant for the privilege of receiving property which was already hers. Under the statute in question here the tax is imposed upon the decedent for the privilege of disposing of his property and is measured by the value of all property as to which he has actually effected a disposition, whether by will or the intestate laws or by transactions inter vivos. Under the Federal estate tax law the tax is not on the beneficiary at all, nor on the property which he receives. It is imposed on the transfer of the estate, is paid by the executors out of the estate as a whole, and operates to diminish the value of the residue. There is no provision providing for the apportionment of the tax among the several legacies and devices. *Matter of Hamlin* (226 N. Y. 407). So far as the surviving tenant is concerned neither he nor the joint estate is burdened with the tax. The principles which governed the New York courts have therefore no bearing.

Under the Federal Constitution the difficulty in taxing the full value contributed by the decedent is no greater than the difficulty in taxing only half the value. It has been shown in the argument in *Shwab* v. *Doyle* (No. 200) that there is no valid constitutional objection to imposing a tax by reason of a disposition made prior to the enactment of the statute. There is therefore nothing to lead the court to make such a radical departure from the accepted principles governing joint tenancies and to declare them analogous to tenancies in common, as was done by the New York courts. The arguments advanced by the district courts above named for holding jointly held property taxable as to one-half only arise from a confusion of the principles governing the Federal estate tax with the principles governing State transfer taxes, and of principles applicable only to State constitutions with principles applicable to the Constitution of the United States.

5. None of the rules of construction invoked by plaintiffs in error applies to the case at bar.

It is submitted that neither the fair intendment of the language used by Congress nor the strict rule of construction permits of the interpretation of the statute in the manner contended for by the plaintiffs in error. If the reasons upon which a construction exempting joint tenancies created prior to September 8, 1916, is asked are examined, it is found that none of them applies to the case at bar. Defendant in error emphatically denies that by includ-

ing in the measure of the tax the full value of property held in joint tenancy created prior to that date, a retroactive operation is given to the statute. What is taxed is not the vested rights of the surviving tenant but the disposition of property by decedent on his death. Since the act applies only to persons dying after its passage and the disposition only takes place on the death, it is in no sense retroactive. This is particularly true in view of the fact that decedent is under no obligation to continue the joint tenancy and subject his estate to this tax. No vested right is taken away, impaired, or even injuriously affected, since the tax falls not on the surviving tenant or on the jointly held property but on the estate of the decedent, and there is no vested right to effect a transfer of property on death free from any tax liability. Nor is a new obligation created or a new liability attached in respect to a transaction already passed, since the tax is imposed not on the original creation of the joint tenancy but on the disposition of property which takes place only on the death. In Matter of Moebus (178 App. Div. 709), the court (Putnam, J.), speaking of the right to impose any tax on the transfer of property under a joint estate created prior to the enactment of the taxing statute, says, on page 711:

> I can not follow the argument that such legislation would impose a retroactive tax, since it is the death from which the succession (if there be a legal succession) is derived. The statute applies to estates *in præsenti* and

> I can see no difficulty in upholding such a taxing power.

Defendant in error further denies that from the construction given by the Government to the statute any absurd, unjust, or oppressive consequence arise. There is nothing absurd, unjust, or oppressive in measuring the tax upon the privilege of transferring property on death by the value of all property actually so transferred, including transfers effected by transactions *inter vivos*, whether such transactions took place before or after the passage of the taxing act. In fact, to exempt from the tax the estates of decedents who have been fortunate or foresighted enough to adopt such forms of disposition would be inequitable to other decedents who accomplished the same result by means of a will or the operation of the intestate laws.

Furthermore, all the rules of construction relied upon by the plaintiffs in error apply only when the statute is of doubtful meaning. This, it is submitted, is not the case here. The wording of the statute is clear and precise and is fairly susceptible of one and of only one meaning, and that is the meaning hereinabove contended for. There is therefore no need for construction of this statute, since the province of construction lies wholly within the domain of ambiguity.

> Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them

is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to to *solve* but not to *create* an ambiguity. (*Hamilton* v. *Rathbone*, 175 U. S. 414, page 421.)

Whatever the motive, the language used clearly expresses the legislative intention and admits of no doubt as to its meaning. This being so, it is only the province of the courts to enforce the statute in accordance with its terms. (*Texas Cement Co.* v. *McCord*, 233 U. S. 157, page 163.)

It is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used. If that is plain, there is an end to construction and the statute is to be taken to mean what it says. (*Adams Express Co.* v. *Kentucky*, 238 U. S. 190, page 199.)

Nor is the rule different if a constitutional question is involved. In this case, it is submitted, no other construction than the one here contended for is fairly possible. The statute is imposed upon the transfer of the net estate of every decedent dying after the passage of the act. In determining the value of the gross estate in order to estimate the net estate, there is to be included the value at the time of the death of all property to the extent of the interest therein held jointly by decedent and any other person except such part as may be shown to have originally belonged to such other person and never to have belonged to decedent. Even if, as suggested by the

district court in its opinion (page 25), "Congress would regard as the original owner of the 'part' the surviving joint tenant who prior to the passage of the act was vested with or possessed of legal title, whether such ownership was the result of a gift or of a contribution of the 'part' of the property embraced within the joint tenancy," this would not aid the plaintiffs in error, for on the allegations of the complaint the property at one time all belonged to the decedent and it is therefore impossible that it should "never" have belonged to him within the meaning of the act.

The conclusion is unavoidable that by the terms of subdivision (c) of section 202 the full value of all property held by the decedent jointly with some other person must be included in the gross estate for the purpose of measuring the tax unless it can be shown that some part was contributed by the surviving tenant; also that by the express terms of the statute this must be done whether the joint estate was created before or after the enactment of the taxing statute.

II.

The provision of the statute requiring that the value of all property placed by the decedent in joint tenancy for himself and another person shall be included in the value of the gross estate is constitutional though the joint estate was created prior to the enactment of the Federal estate tax law.

It has already been shown that if a man places his property in joint tenancy for himself and another that is just as much of a disposition of that property

on death as the making of a transfer or the creation of a trust in contemplation of death or to take effect at or after death. The constitutional principles governing the question in the case at bar are therefore the same as the constitutional principles governing the case of *Shwab* v. *Doyle* (No. 200) and the companion cases. It would only burden the court to repeat them here. The case will therefore be rested upon the principles set forth in the briefs for the defendant in error in those cases.

It should be remarked, however, that while the placing of property in joint tenancy in the manner described in the case at bar is a disposition of the same upon death, and may properly be classed with strictly testamentary dispositions, no contention is made that the creation of the joint tenancy here involved was made in contemplation of death any more than that the creation of any joint estate, the distinguishing feature of which is the right of survivorship, is made in contemplation of death. Plaintiffs in error argue at length that the complaint does not disclose any transfer in contemplation of death. It is conceded that the creation of the original estate was not a transfer in contemplation of death in the technical meaning of the term. It is, however, submitted that the reason which induces every decedent to place his property in joint tenancy rather than in tenancy in common is to have the benefit of the right of survivorship and to dispose of his property on his death by means of that right instead of by will. While the joint estate in the

case at bar was not created because the decedent was in immediate danger of death, it was created so that his property might pass upon his death to his cotenant without the agency of a will. In this sense the creation of this joint tenancy was clearly a testamentary disposition of the property or, to use the language of the English courts, "a substitute for a will."

Only one point on the constitutionality of the statute made by plaintiffs in error need be noticed. Plaintiffs in error contend that if construed to apply to joint estates created prior to its enactment into law is an *ex post facto* law. It is settled that *ex post facto* laws refer only to enactments imposing criminal liability or penalties. (*Locke* v. *New Orleans*, 4 Wall., 172.) All other points are fully covered in the briefs for the defendant in error submitted in the *Shwab case* and the cases allied with it.

CONCLUSION.

For the foregoing reasons the judgment of the Circuit Court of Appeals for the Second Circuit is correct and should be affirmed.

Respectfully submitted.

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APRIL, 1922.

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KNOX, SURVIVING EXECUTOR OF KISSAM, ET AL. *v.* McELLIGOTT, LATE COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 602. Argued April 18, 1922.—Decided May 1, 1922.

Decided upon the authority of *Shwab* v. *Doyle, ante,* 529. 275 Fed. 545, reversed.

ERROR to a judgment of the Circuit Court of Appeals reversing a judgment of the District Court for the plaintiff, Knox, in an action to recover a sum collected as an estate tax.

Mr. Stark B. Ferriss for plaintiffs in error.

Mr. James A. Fowler, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* and *Mr. Richard S. Holmes* were on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the same principles and contentions passed on in Nos. 200, 236 and 303, *ante*, 529, 537, 542.

It, as they, is an action to recover a tax ($11,819.74) assessed by the Commissioner of Internal Revenue as an additional estate tax on the estate of Jonas B. Kissam, deceased, under the Act of September 8, 1916, as amended in 1917. The action was brought in the United States District Court for the Southern District of New York.

The complaint was a voluminous paper and contained at least four causes of action. As to the first, consisting of twenty-two paragraphs, McElligott filed a demurrer. Plaintiff made a motion for judgment on the pleadings. The motion was granted and a final judgment was awarded against " defendant on the merits for the relief prayed for in the first cause of action set forth " in the complaint.

The judgment was reversed by the Circuit Court of Appeals, 275 Fed. 545.

The following four paragraphs are a summary of the allegations of the complaint stated narratively:

In 1912 the decedent, Jonas B. Kissam, was the owner of certain bonds and mortgages and corporate bonds. In that year he conveyed the property to the plaintiff in error, John C. Knox who, shortly thereafter, reconveyed the same to Kissam and his wife Cornelia B. Kissam, as joint tenants. All of the parties resided in the State of New York.

In 1917 Kissam died leaving Mrs. Kissam surviving him. She was made one of the executors of the will as well as sole beneficiary thereunder.

On December 7, 1917, she as executrix and Knox as executor, made a return of the federal estate tax on the entire estate of Jonas B. Kissam. They included in the return the value of one-half of the jointly owned property

which was owned and enjoyed by decedent, but did not include the value of the one-half of the jointly owned property which had been owned and enjoyed by Mrs. Kissam since the creating of the joint estates in July and August of 1912.

A tax of $5,354.14 based upon the return was paid by the plaintiffs in error. On May 9, 1919, the Commissioner of Internal Revenue added to the estate the one-half interest of the value of the estate and assessed as a tax in addition to that which was paid, the sum of $13,668.60. The additional tax was paid under protest and to recover it is the purpose of the action.

The Circuit Court of Appeals stating the contention of the executors said, that "they claimed that the assessment was void as to the half of the joint property which vested in Cornelia [Mrs. Kissam] before the passage of the Act of September 8, 1916, as amended, and also that the act itself was unconstitutional as a direct tax upon property without apportionment among the several States as required by Article I, § 9, subdivision 4, of the Constitution."

But this contention was the alternative of the contention which plaintiffs in error also made, that the Act of September 8, 1916, as amended, was not intended to have retrospective operation. And this was the decision of the District Court, the court saying, "It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of 'every decedent dying after the passage of this Act'; but the assumption must be that this relates to estates thereafter created and not to then existing vested property." And the court added "At the time the statute was passed Cornelia Kissam's interest belonged to her." The court further observed, "From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or

control." The court rejected that conclusion and denied to the acts of Congress retroactive operation. To this the Circuit Court of Appeals was opposed and reversed the judgment based upon it.

It will be observed, therefore, that this case involves the same question as that decided in *Shwab* v. *Doyle*, *ante*, 529, and on the authority of that case the judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.